Supreme Court, U.S.
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In The

Supreme Court of the United States

Bobby W. Kennedy, et al, Pro Se

Petitioner,

vs.

Frigidaire Company, et al.

Respondent

Petition for Writ of Certiorari
In the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

BOBBY W. KENNEDY, ET AL.
Petitioner, Pro Se
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40 pp

QUESTIONS PRESENTED

1)Whether the petitioners were discriminated against and denied due process and equal protection of the law and denied a trial by jury when the circuit judge was biased against the petitioners issued a summary judgment in favor of the defendants, affirmed by the State Supreme Court, when the appellant's home was totally destroyed by fire caused by a defective clothes dryer that a notice of recall had been given to other purchasers ,and in fact purchaser had been paid by the manufacturer for their defective clothes dryer,and the petitioners had not been told by the defendant that their clothes dryer had been recalled admitting fraud and leaving the appellants in harms way for a disaster that happened and the other defendants that had a defective leaking propane tank removed the tank, and removed parts, spoiled evidence and covered up their defect before it could be inspected by state investigator authorized by state law to inspect all propane systems before the removal from the fire scene and the judge failed to give the petitioners the same due process and equal protection by allowing their case to go to a jury when state law required the spoliation and defective clothes dryer evidence to be decided only by a jury when the Jefferson County ,Alabama Circuit Judge allowed a case in that court of the defective White Westing-house , Frigidiare clothes dryer to go to a jury, while the biased judge against the appellants denied them a trial by jury with the same loss in Marshall County, Alabama.?

2) Whether judge violated the petitioners's constitutional rights when he instructed the plaintiffs that they could not win as Pro Se in his court without an attorney and the Frigidaire attorney withheld evidence and lied to the court and said that he did not have an expert witness investigative report of the fire scene when he did have an expert witness , report on the fire and denied of a recall of the defective clothes dryer . Defendants' expert told Bobby Kennedy that the window glass in the utility room that contained the clothes dryer was smoked up and that was where the fire started . Frigidaire had recalled the defendants clothes dryer and purchased the dryer from citizens and did not offer a recall to the plaintiffs and withheld and denied evidence of a recall after production request to the defendant explicitely requesting recalls of this defective clothes dryer that destroyed the plaintiffs' home ?

3). Whether the Circuit Court Judge was biased against the petitioners in not following the Alabama laws in making a decision on the Negligence, AEMLD, Spoliation, and Product Liability when law is clear and that these issues can only be decided by a jury and whether the judge had a right to make a decision on the AEMLD claims when the defendant Allgas admitted that the plaintiffs had an AEMLD claim against Frigidaire and Allgas and the law requires it to go to a jury.

PARTIES TO THE PROCEEDING

Bobby W. Kennedy, Carolyn S. Kennedy,and Jimmy P . Kennedy were the Plaintiffs in the lower court proceedings and the appellants before the Court of Civil Appeals of Alabama and Petitioners in The Supreme Court of Alabama.

Frigidaire Company,White Consolidated Industries, Inc. Sam's Club,Incorporated , Lampton Love Incorporated, Allgas Incorporated, C.L. Jimmy Fortenberry, Ronald Wayne Puckett, Bruce Laviner were the defendants in the case before the lower circuit court proceedings of this case and the appellees before the Court of Civil Appeals of Alabama and Respondents in The Supreme Court of Alabama.

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In The

SUPREME COURT OF THE UNITED STATES

BOBBY W. KENNEDY, ET AL

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Petition for Writ of Certiorari to the
Alabama Supreme Court

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On November 17, 2000 the Supreme Court of Alabama issued its opinion on the petition for writ of certiorari,affirming the decision of the Court of Civil Appeals of Alabama and the Circuit Court with no opinion.

JURISDICTION

The circuit court rendered its opinion in this case on August 30, 1999 . The Court of Civil Appeals affirmed the judgment on June 9, 2000 with no opinion. An application for rehearing was overruled on August 4, 2000 with no opinion by the Court of Civil Appeals of Alabama. The petitioner moved for a Petition for Writ of Certiorari in the Supreme Court of Alabama and November 17, 2000, the writ was denied. On December 1, 2000 the Supreme Court of Alabama ordered that the application for rehearing filed on November 28, 2000 be striken. Petitioner made a motion to set aside the order striking the application for rehearing and to remand to circuit court for a trial by jury and the order was striken on December 13, 2000 by the Supreme Court of Alabama. This is the judgment sought to be reviewed.This court has jurisdiction to review the judgment of the Supreme Court of Alabama by Writ of Certiorari pursuant to 28 U.S.C. 1257

STATUTES INVOLVED

Under Articles of the Constitution of the United States, 28 USC 1251 and U.S. Constitution Amendments 5, 11, 14, 28 U.S.C. Section 1346 et. seq., under Title VII Civil Rights Act of 1992 and 42 U.S.C. S 2000(e), 28 U.S.C. S 2254b
National Fire Prevention Association 921. S 9-3-1-c at p. 921-66 , (1995 ed), AEMLD, Civ. Proc. 44, Civil Rights Act 1964 , Title VII "Equal Protecton and due process clause."

STATEMENT OF THE CASE

This action was filed in the United States Circuit Court, Marshall County, Alabama, Guntersville Division on April 3, 1997 seeking remedies under AEMLD, 14th Amendment, 5th Amendment, Civil Rights Act 1964, Title VII, and Civil Procedure 44, Product Liability , State Tort Laws . The petitioners contend that they have been denied due process, equal protection, an discriminated against and denied a trial by jury when the circuit judge was biased against the appellants, issued a summary judgment in favor of the defendants, affirmed by the Supreme Court, when the appellants' home was totally destroyed by fire caused by a defective clothes dryer that a notice of recall had been given to other purchasers and , in fact, purchasers had been paid by the manufacturer for their defective clothes dryer, but had not been given to the appellants, leaving the appellants in harms way for a disaster that happened, and the petitioners were denied due process and equal protection of a court trial when they produced substantial evidence that the clothes dryer was defective and was the cuase of the fire that set off the leaking defective propane tank of spoliation when a defective, leaking propane tank and evidence was removed from the scene and parts were removed before the appellants, their expert witness, or the LP Gasboard inspector could inspect the tank at the scene of the fire. This is a clear violation of the AEMLD law. The petitioners' civil rights were violated and were discriminated against and denied due process and equal protection of the law under the 5th and 14th Amendment to the U.S.

Constitution to have a trial by jury when others similarly situated had had a trial by jury . The petitioner had survived a summary judgment and judge Jetton said there were material facts of law that demanded a jury trial when Judge Jetton set a date for the case to go to trial, then this senior judge retired, and Judge Jolley took over and reversed the senior judge's decision and issued a summary judgment in favor of the defendants. This judge failed to give the appellants the same due process and equal protection under the law by not allowing their case to go to a jury when state law required the defective dryer coverup, fraud and the spoliation evidence to be decided only by a jury . The Jefferson County, Alabama circuit judge allowed the fire case of the same brand defective clothes dryer to go to a jury where the plaintiffs won their case. The appellants' constitutional rights under the equal protection and due process were violated when the circuit judge instructed the plaintiffs that they could not win in his court without an attorney. The courts of Alabama have been biased against Pro Se plaintiffs with dismissal of cases with no justice under the U.S. Constitution.

Undisputed Fact

1. The Petitioners lost a home, contents, and personal property by a fire .

2. The defendant, Frigidaire, knew of the defective clothes dryer that had been recalled prior to the appellants' fire, but said there was no recall on their clothes dryer .

3. The defendant, Allgas, removed their propane tank from the fire scene and removed parts before the tank was inspected on the fire scene and defendant's, Allgas, admitted spoliation .

4. The appellants were treated differently by the Marshall County, Alabama Court than the Jefferson County, Alabama Court that allowed a fire case involving this same clothes dryer to be heard by a jury. Other clothes dryer cases in the United States were also afforded a jury trial.

5. Judge Jetton, senior judge, in the first summary judgment stated , "Upon consideration of the defendants Motion for Summary Judgment supporting and opposing this court finds there are genuine issues of material facts and that the defendants motion should be and are hereby overruled.

6. Judge Jolley who replaced Judge Jetton when he retired stated in the second summary judgment, there were no genuine issues as to any material facts .

7. Alabama law states in AEMLD, the defective clothes dryer, fraud, discrimination, due process, and equal protection spoliation cases, only a jury can decide on these cases.

Petitioner's Position

Petitioners contend they were discriminated against and denied due process and equal protection, denied a trial by jury, and their constitutional rights of equal protection were violated when different scales of justice were used and the petitioners were treated differently than other courts treated similar cases.

The judge was biased against the appellant and had prejudice against the appellants , Pro Se, as it was first surfaced when Judge William Jetton told the appellants they can not win in his court because they

are not lawyers. The circuit judge, Judge Jolley, was biased against the plaintiffs because they started the law suit Pro Se and not attorneys and the judge erred in making a judgment that only a jury by law must decide this case. Jolley were biased against the appellants and treated them differently in Marshall County than the Jefferson County Court treated the plaintiff Wilkerson in a case that involved the same clothes dryer where they won a judgment of $150,000.00 for their home which was destroyed by this defective, recalled clothes dryer. White Consolidated Industries, Inc. et al. v. American Liberty Insurance Company and Mary Evans McKinney, S. C. 1911560, April 2, 1993. (Ala.). Also, White Consolidated Industries, Inc. v. Albert C. Wilkerson Brenda Wilkerson, and Vesta Fire Insurance Company SC 1971220, Supreme Court of Alabama, April 23, 1999. Petitioners equal protection under the U.S. Constitution were due the same justice given by the Jefferson County versus Marshall county.

Judge Jolley erred when he stated that the deposition of plaintiff's expert indicates that there is nothing more than mere speculation as to several possible causes of the fire . Steve Hollich , plaintiff's expert witness,states, "the dryer overheated or somehow created an ignition source that was high enough to ignite this propane gas " A. Right" Judge Jolley also stated , "Further the affidavit of plaintiffs' expert contradicts his deposition testimony and is striken also for that reason". Hollich, plaintiff's expert witness's affidavit states, "The propane gas was ignited by the clothes dryer and this caused the fire". There was no contradiction and the statement in his deposition and his affidavit was the same.

Plaintiffs produced substantial evidence of defective recalled clothes dryer and spoliation when Allgas removed the defective propane tank from the fire scene before anyone , the plaintiffs, their expert witness, or the LP gasboard inspector , could inspect the tank. Parts were removed,and the tank was re-painted before the plaintiffs or expert witness was able to inspect the tank. There were also recalls on the clothes dryer and defendant's attorney, Ward Wilson, admitted, "As to their claims against Allgas and other related defendants, they have got an AEMLD claim just as they've got one against the dryer company."

Petitioners were not afforded their rights in this case .Judge Jolley did not consider affidavits as he stated in the order for summary judgment. They were striken. Jolley erred. docket sheet shows Motion by defendant on 9-2-99 to strike affidavits. The Motion by defendant to strike the affidavits were filed 9-2-99 after Jolley's Order for Summary Judgment on 8-30-99. The affidavits were filed on 8-6-99, in the Marshall County Circuit Court and Jolley said they were striken in order on 8-30-99. Defendant had not filed to strike affidavits until 9-2-99. Dan King, plaintiffs' attorney, sent a letter to Judge Jolley concerning affidavits and leave to file 7 days late, 9-26-99.

New evidence, letter from CNBC, received after the petition for Writ of Certrioria was submitted in August 17, 2000, clearly shows that Frigidaire violated the Alabama Extended Manufacturer Liability Doctrine,AEMLD, by recall the clothes dryer that caused the fire and destroyed the plaintiff's home was recalled in Canada and was never told to the American people, the same tactics that Firestone

was using in other countries, but giving no notice to the American people and caused loss of many lives and millions in damages while keeping quiet to the American people. An enormous number of homes were destroyed in the United States, Canada, and the rest of the world with no doubt many lives of people were lost in house fires while this clothes dryer overheated, caught on fire and destroyed their home while the dryer was supposed to cut off when actually the heating element sagged and caused the element to short and stay on after the clothes dryer timer was supposed to have shut the dryer off. This is a clear violation of the AEMLD law and this case is due to be remanded for a trial by jury as the only way this case can be settled by law. The Frigidaire Company had a fix for this problem in Canada and recalled the dryer to have a switch installed, but never recalled the dryer in the U.S. The Frigidaire Company also gave $230.00 refund for the same dryer in Canada and offered no refund in the U.S. Frigidaire discriminated against the appellants and other owners in the U.S. This case should be certified as a class action against Frigidaire for their negligence , willful and wonton act against the American consumer.The appellees claimed recalls of the clothes dryers were heresay when in fact there were recalls and Frigidaire offered consumers $230.00 for the clothes dryers that were recalled.

As part of the clothes dryer recall and coverup Frigidaire has pulled their parts manual and their operating manual off the market and away from dealers and customers . They are covering up their AEMLD failed product in the same manner as Firestone's deadly tire problems and they knew of the dangerous product that could cause the death of

customers by the clothes dryer staying on even when the timer had shut off while customers were asleep causing deaths by burning their house up around them. Frigidiare chose to cover up this faulty product that violated the AEMLD law and the U.S. Consumer Product Safety laws.

ARGUMENT

1). Whether the petitioners were discriminated against and denied due process and equal protection of the law and denied a trial by jury when the circuit judge was biased against the appellant, issued a summary judgment in favor of the defendants, affirmed by the State Supreme Court, when the appellant's home was totally destroyed by fire caused by a defective clothes that a notice of recall had been given to other purchasers, and in fact, purchaser had been paid by the manufacturer for their defective clothes dryer, and the petitioners had not been told by the defendants that their clothes dryer had been recalled admitting fraud and leaving the appellants in harms way for a disaster that happened and the other defendants that had a defective leaking propane tank removed parts from the tank, spoiled evidence and covered up their defect before it could be inspected by state investigator authorized by state law to inspect before the removal from the fire scene and the judge failed to give the petitioners the same due process and equal protection by allowing their case to go to a jury when state law required the spoliation and defective clothes dryer evidence to be decided only by a jury when the Jefferson County, alabama Circuit Judge allowed a case in that court of the defective Whit Westinghouse, Frigidaire clothes dryer to go to a jury, while the biased judge against

the appellants denied them a trial by jury with the same loss in Marshall county, Alabama?

In this case Bobby W. Kennedy et al. v Frigidaire, Inc. et. al. the decision of the Marshall Circuit Court was affirmed with no opinion by the Court of Civil Appeals. The decision is in conflict with a prior decision of the Supreme Court on the same point of law. In its opinion the court held White Consolidated Industries, Inc. v. Albert C. Wilkerson, Belinda Wilkerson and Vesta Fire Insurance Company. 1971220, Supreme Court of Alabama , April 23, 1999, the Supreme Court held and affirmeed in part for the property damages under the AEMLD and remanded the cause for a new trial or other proceedings consistent with this opinion.

Circuit Court Judge Jolley erred in granting summary judgment as a matter of law stating there was no genuine issue as to any material facts after the defendant Allgas had admitted in their brief that the plaintiff had a claim under the AEMLD.R-18, par 3 .

A claim under the AEMLD is grounded in tort and is premised on the motion that "a[manufacturer's marketing] a product not reasonably safe, when applied to its intended use in the usual and customary manner, constitutes negligence as a matter of law "Casrell v. Altec Industries, Inc. 335 So.2d 128, 132 (Ala. 1976) (emphasis in original). "Under the AEMLD, a manufacturer has the duty to design and manufacture a product that is reasonably safe for its intended purpose and use."Townsend v. General Motors Corp. 642 So.2d 11, 415 (Ala. 1994).

In Alabama Power Company v. Garrett Murray and Fragil Murray, 1971174 Supreme Court of Alabama, August 6, 1999, the supreme Court

Cook, J. held that (1) jury instruction on spoliation of the evidence was justified. The appellees Allgas spoiled evidence by removing the tank from the fire scene, replaced parts, and painted the tank before the plaintiffs or their expert witness, or the Ala LP gasboard inspector could inspect the propane tank at the fire scene. This is tampering with evidence and against Alabama law and an automatic admission of guilt. The plaintiff should have won by Alabama law on spoliation and Judge Jolley erred by not granting a trial for the plaintiffs. Also (the spoliation of evidence doctrine was applicable where there was evidence tending to show that the defendant "had purposely destroyed the [evidence] or had intentionally caused its destruction").Alabama Waste Services, Inc. 709 So.2d 61, 66 (Ala. Civ. App 1998) In Empiregas Inc. of Huntsville v. Ernest R. Simpson and Alfa Mutual Insurance Company, 87-1486, Supreme Court of Alabama May 26, 1989, Supreme Court,Jones J. held that (2) trial court properly submitted theory that furnisher was liable under extended manufacturer's liability doctrine for jury determination. In Carol Powers Atkins v. American Motors Corp. et al. SC 1488, Supreme Court of Alabama, May 21, 1976, the Supreme Court held : that complainant sufficiently alleged cause of action predicated on theory that defendant marketed a product that was not reasonably safe when used for its intended purpose. The trial court Judge Jolley should have sent the appellant's case for jury trial.

In our case, Bobby W. Kennedy et. al. v. Frigidaire et. al., Judge Jolley had wrongfully struck the affidavits filed by the plaintiffs and the affidavits of the plaintiffs' expert and Judge Jolley further stated the plaintiffs expert contradicts his desposition

testimony and is stricken.He should have granted a trial and allowed the affidavits and allowed the expert witness to explain any statements that he had made.There was no contradiction and the statement in his deposition and his affidavit were the same. Hollich's affidavit, and Hollich's deposition. He stated the propane gas was ignited by the clothes dryer and this caused the fire. Further, Judge Jolley's statement there is no genuine issue as to any material facts and defendants are entitled to a judgment as a matter of law was in error. Senior Judge W. Jetton had previously ruled that there were genuine issues as to material facts and denied the defendants a summary judgment. A defect of the Frigidaire White Consolidated Industries clothes dryer was detected and had been recalled for shorting in the heating element and causing house fires after the timer had shut off . Further Allgas was guilty of spoliation of evidence by removing and destroying evidence of the propane tank and the propane gas system.
Fire insurer seeking subrogation from dryer manufacturer for amount paid to insureds after fire destroyed their home and rare book collection, introduced evidence at trial that excluded misuse of dryer as cause of fire and was sufficient to allow jury to infer that dryer was defective and thus caused fire. Weir v. Federal Ins. Co., 811 F.2d 1387, C.A. 10 (Colo.) 1987

The judge bought the defendants' story over the plaintiff and the defendant offered phony evidence and lied and committed fraud when he said the manufacturer had no recalls or no expert witness report.

Evidence offered by defendant that is contrary to evidence offered by plaintiff creates question for jury

in products liability action; it does not prevent jury from relying on plaintiff's evidence and inferring defect. Weir v. Federal Ins. Co. 811 F.2d 1387

There was no warning given to the plaintiff after defendant had recalled the clothes dryer because it had destroyed thousands of homes because of defects. Jury has wide latitude in finding that product is unreasonably dangerous because it could have been constructed so as to reduce risk of injury. Adams v. Fuqua Industries, Inc. 820 F.2d 271. C.A.8 (Mo.) 1987.

Under New York law, question of superseding cause in products liability action is generally one for jury, and only in rare instances can question be decided as matter of law. Parsons v. Honeywell, Inc. 929 F.2d 901. C.A. 2 (N.Y.) 1991

The Petitioners were treated different under Alabama law than other plaintiffs in cases in Alabama and other states unequal justice and due process.

When assumption of risk is raised as defense in products liability action, whether plaintiff knows of existence of risk and whether he appreciates its magnitude and unreasonable chaaracter are questions of fact to be determined by jury; however, before theory may be submitted to jury, defendant must produce evidence that plaintiff fully understood specific risk and yet voluntarily chose to enounter it. Wagner v. Firestone Tire & Rubber Co., 890 F.2d 652 C.A.3 (Pa) 1989

Whether warning on product is adequate is usually question for jury unless reasonable minds could not disagree on outcome. Goins v. Clorox Co., 926 F.2d 559.

Petitioner's case should have been presneted to a

jury. There was no due process because plaintiffs' rights were violated by judge because there was no jury trial on issues that required a jury. AEMLD and Spoliation, which was admitted by defendant, alone was an issue for jury trial.

Petitioners' expert witness testified that the only possible source of fire was the clothes dryer and smoked window glass of the utility room where the fire started was admitted by the defendants' expert witness, that the fire started in the utility room.

Under Texas products liability law, directed verdict should not have been granted in strict products liability action involving allegedly defective television set that allegedly caused a fire, where could testified sparks appeared at rear of television set and expert witnesses opined that television set was the only possible source of the fire and that the fire began inside the set. Ayres v. Sears, Roebuck & Co. 789 F.2d 1173. C.A. 5 (Tex) 1986

If trier of fact found that prior fire put manufacturer on notice of defect in heater, it could find that the manufacturer acted with reckless indifference to public safety by failing to either recall heater in question or warn consumers of the problem by the time of the fire in question some 11 months later, even though the heater in question was manufactured prior to the initial fire. Bastial v. TPI Corp. 663 F.Supp 474, N.D.Ill 1987.

The defendant knew of the defect and had recalled the same clothes dryer in Canada before the petitioners fire and did not notify the petitioner of the danger.

Petitioner established a prima facie case ; the clothes dryer was recalled because it stayed on and overheated after the timer had shut off resulting in

100,000 house fires.

Manufacturer could have warned of the dangers of the clothes dryer defect and avoided accident of house fire.

Evidence was sufficient to support inference that riding lawnmower was unreasonably dangerous such that manufacturer could be held strictly liable for injuries sustained by owner; there was evidence of blade injuries resulting from tip-over accidents and that deadman device might have prevented owner's injuries and could reasonably have been installed. Tafoya v. Sears roebuck and Co. 884 F.2d 1330 C.A. 10 (Colo.) 1989

Injured plaintiff need not prove that absent safety devices were or should have been known to lawn mower manufacturer at time mower was manufactured in products liability action, as whenter lawn mower was as safe as other lawn mowers manufactured at same time was irrelevant to question as to whether lawn mower was unrasonably dangerous. Adams V. Fuqua Industries, Inc. 820 F.2d 271 C.A.8 (Mo.) 1987

Testimony of one of Swedish chain saw manufacturer's quality managers that swedish regulations required chain brakes on chain saws prior to year in which chain saw without chain brake was sold in Alabama wa admissible in products liability diversity action against manufacturer to recover for injuries sustained while operating chain saw in order to show that manufacturer knew first hand that chain brakes were very beneficial. Nettles v. Electrolux Motor AB, 784 F.2d 1574 C.A.11 (Ala.) 1986.

The above case shows substantial sumilarity . The clothes dryer in Jefferson County was the same as the petitioners, a Frigidaire manufactured model.

Alabama product liability : The defect in clothes dryer was liability in state tort laws to purchaser. Defect in clothes dryer caused the clothes dryer to stay on after the timer had shut off causing fire to destroy home. No warning was ever supplied the owner of clothes dryer of the defect even though the manfacturer recalled the dryer and paid other purchasers for the same defective clothes dryer.

ED Mich. 1996 Obvious danger associated with a product will obviate manufacturer's product liability duty to warn and/or protect and a failure to (ED Mich. 1991) warn and design defect product liability and remain broadly accepted principle of product liability law.

1996 Treadway v. Smith & Wesson Corp. 950 F. Supp 1326

1991 Raines v. Colt Industries, Inc. 757 F. Supp. 819

DN5 1996 Manufacturer is under duty to warn foreseable user of danger if machine is not safe

Finley V. NCR Corp. 964 F Supp 882

Due process and equal protection clause appears in both Fifth and Fourteenth Amendments, whereas equal protection clause does not, primary office of latter differs from and is additive to, protection guaranteed by former Hampton v. Mow Sun Wong (1976) 426 US 88, 48 L. Ed 2d 495, 96 S Ct 1895, 12 BNA FEP Cas 1377, 11 CCH EPD P. 10955. Fourteenth Amendment does not prohibit legislation limited as to objects or territory, but merely that all persons subject to it shall be treated alike, under like circumstances and conditions. Hayes v. Missouri (1887) 120 US 68, 30 L.Ed 578, 7 S Ct 350. Equal protection of laws is pledge of protection of equal laws to all under like circumstances . German Alliance Ins. Co. v. Hale (1911) 219 US 307, 55 L.Ed

229, 31 S Ct 246.

Purpose of equal protection clause in Federal Constitution is to rest rights of all persons upon same rule under similar circumstances . Frost v. Corporation Com. of Oklahoma (1929) 278 US 515, 73 L. Ed 483, 49 S Ct 235.

Fifth Amendment forbids discrimination that is so unjustifiable as to be violative of due process Rock v. Arkansas (1987) 483 US 44, 97 L Ed 2d 37, 107 S Ct 2704, 22 Fed Rules Evid Serv 1128.

White Consolidated, Inc. is the parent company of Frigidaire and WhiteConsolidated makes several clothes dryers under the names of Frigidaire, Gibson,White Westinghouse, Kelvinator, and etc. and they all are of the same model and design with different names, but are the same except for names. The Supreme Court of Alabama case White Consolidated Industries, Inc. et al. v. American Liberty Insurance Company and Mary Evans McKinney, 1911560, April 2, 1993 involving the White Consolidated Industries clothes dryer is the same company that manufactured. The clothes dryer manufactured by White Consolidated Industries malfunctioned and caused the fire that destroyed Mary Evans McKinney's house. This case was decided in her favor in Jefferson County, Alabama Circuit Court. This is a parallel case to Bobby W. Kennedy, et. al. v. Frigidaire, et. al. involving the same company's clothes dryer that was under recall that destroyed the appellants house. The appellants did not receive the same or basic justice as Mary Evans McKinney received in Jefferson County Circuit Court. The laws of Alabama and the material facts in this case required Judge Jolley to allow a jury to decide this case. Instead, he issued a wrongful

summary judgment against the appellant. In SC 1911560, Supreme Court of Alabama, April 2, 1993, the Supreme Court held that : (l) prior inconsistent statement is inadmissible to impeach witness unless proper foundation is laid : (2) counsel's tardiness in releasing information regarding plaintiff's expert witness less than two weeks before trial did not require exclusion of witnessess' testimony; and (3) verdict for homeowner was not excessive. AFFIRMED. 1. Constitutional law : Equal protection clause prohibits prosecutor from using peremptory jury strikes in a bias discriminatory manner U.S.C.A. Const. amend l4. 2. Witnesses : Prior inconsistent statement is inadmissible for impeachment, unless foundation is laid by asking witness about statement at issue, even though statement is admissible heresay as business record. rules Civ. Proc. Rule 44. 3. Witnesses :Although foundation requirement for impeaching witness with prior inconsistent statement is not to be rigidly applied, witness must be given such notice of prior statement as should be necessary to job faulty memory, thus allowing witness to recognize and to either deny or explain earlier inconsistency : 8. Evidence : Products Liability Expert testimony and testimony of homeowner that she saw flames coming out of back of clothes dryer supported verdict against manufacturer's successor, even though expert testimony was conflicting. 9. Damages Award of $150,000 against successor to dryer manufacturer was not excessive for damages suffered by homeowner who sustanied compression fracture as result of jumping from window to avoid fire that started with clothes dryer. Homeowner and insurer brought action against successor to dryer manufacturer to

recover for damage caused by fire that began with clothes dryer and jury verdict was in favor of homeowner and insurer. Defendants attorneys were William Dudley Motlow, Jr.and Gary L. Weaver of Porterfield, Harper & Mills, P.A. Birmingham, for appellants in the Supreme Court case and White Consolidated Industries was the defendant in the Civil Court case originally. This is the same firm that are defendants for White Consolidated, Inc. and Frigidaire in this case and the same firm that have denied any cases involving White Consolidated Industries, and Frigidaire house fires from defective clothes dryers .

2). Whether the judge violated the petitioner's constitutional rights when he instructed the plaintiffs that they could not win as Pro Se in his court without an attorney and the Frigidaire attorney withheld evidence and lied to the court and said that he did not have an expert witness investigative report of the fire scene when he did have an expert witness report on the fire and denied of a recall of the defective clothes dryer. Defendants' expert told Bobby Kennedy that the window glass in the utility room that contained the clothes dryer was smoked up and that was where the fire started ?

White Consolidated Industries and Frigidaire refused to provide discovery on 10,000 house fires caused by their clothes dryers and a recall on this model clothes dryer that caused this fire where their dryer heating element shorted to the dryer and stayed on after the clothes dryer timer had supposedly shut the dryer off. This defect overheated the clothes dryer and ignited the leaking propane gas

from Allgas' propane tank and system that was never tested to check for leaks prior to turning the propane on into a dwelling putting everyone's life at risk and then removing the propane tank immediately after the fire and was guilty of spoliation of evidence to prevent the propane tank and system to be inspected for failure by the state LP gasboard inspector violating state law of removing the tank, fixtures, and spoiling evidence to cover up the negligence. The appellants have laid a predicate for introduction to records such as recalls of White Consolidated Industries, Inc. clothes dryers and the insurance company's expert witness report that was requested by the appellants before the lawsuit was filed and the same report the appellees' attorney denied existed, then found the report after the judge had dismissed the case and said if he found there was a report that had not been shown he would blow this case apart. Christie states, "I don't recall there being a report."

Alabama statutes set forth the elements of fraud (Ala. Code S 6-5-100) misrepresentation of a material fact (Ala. Code S 6-5-101), suppression of a material fact (Ala. Code S 6-5-102), deceit (Ala. Code S 6-5-103) and fradulent deceit (Ala. Code S 6-5-104). The elements of fraudulent misreprsentation are : a false representation which : (1) is known to be false when made or (2) is made recklessly without regard to its truth or falsity, or (3) is said to be true without actual knowledge if it is true; b. reliance on the false representation; c. such reliance was reasonable; and d. damage proximately resulting from the reliance. Foremost Ins. Co. v. Parham, 696 So. 2d 409 (Ala 1997); Patel v. Hanna, 525 So. 2d 1359 (Ala. 1988); McAlister v. Deatherage, 523 So. 2d 387 (Ala. 1988).Frigidaire knew that they had

recalled the defective clothes dryer and stated in court that they had not had a recall.

In order to establish a claim for fraud based upon a party's failure to perform future acts as promised, a plaintiff must not only show that the defendant intended to deceive the plaintiff at the time the representation was made and that the defendant had no intent to perform at the time the representation was made. National Sec. Ins. Co. v. Donaldson, 664 So. 2d 871 (Ala. 1995)

The party alleging fraud must show that she relied on the misrepresentation. Timmons v. Central Bank of the South, 28 So. 2d 845 (Ala. 1988).

The petitioners relied on the clothes dryer to be safe and Frigidaire misrepresented the clothes dryer as safe and the petitioners' house burned down.The defendant had a duty to disclose a material fact, the defendant failed to disclose and concealed the material fact and the defendant's failure to disclose, or concealment of, the material fact induced plaintiff to act or to refrain from acting ; and the plaintiff suffered damage as a result of the action, or inaction, induced by defendant's failure to disclose, or concealment of, the material fact. Compass Point condominium Owners Ass'n v. first Federal Sav. & Loan Ass'n of Florence, 641 S. 2d 253 (Ala. 1994); Howard Griggs Trucking, Inc. v american Central Ins. Co. 894 F. Supp. 1503 (M.D. Ala. 1995); American Economy Ins. Co. v. Fort Deposit Bank, 890 F.Supp. 1011 (M.D. Ala. 1995)

Frigidaire and Allgas were fraudulent in that their products were unsafe, with no warning to the petitioners.

If the seller or agent has knowledge of specific defects that would affect health or safety and the

defects are not known to or readily observable by the purchaser, the vendor or agent has a duty to disclose the information about the defects and is liable for damages caused by failure to disclose. Roberts v. C & S Sovran Credit Corp. of Alabama 621 So. 2d 1294 (Ala. 1993).

Sam's Wholsesale Club did not disclose the information about the defects.

Warranties created by the seller by affirmation of fact or promise which relat to the good and becomee part of the "basis of the bargain" require that the good shall conform to the description, whether or not the seller is a merchant. Ala. Code S 7-2-313. Liberty Truck Sales, Inc. v. Kimbrel, 548 So. 2d 1379 (Ala. 1989) A merchant warrants that the goods are fit for the ordinary purposes for which goods of that kind are used. ala. Code S 7-2-314 Century 21-Reeves v. McDonnell Cadillac, 626 S. 2d 1273 (Ala. 1993)

Frigidaire breached their contract for selling a clothes dryer that was defective.

The buyer may sue for economic loss and may recover damages for any non-conformity of tender proximately resulting from the seller's breach as determined in any manner which is reasonable . Ala. Code SS 7-2-714, 7-2-717.

A consumer may recover for injury to person or property proximately resulting from any breach of warranty. Ala. Code S 7--715 Volkswagen of america v. Dillard, 579 S. 2d 1301 (Ala. 1991)

Frigidaire and Allgas were responsible to the appelants under 15 USC 2301 thru 2312 and failed to provide a safe product and are liable for damages.

Compensatory damages in an action for fraud consists of the difference between the value of the property as represented and its actual value. Johnny

Spradin Auto Parts v. Cochran, 568 S. 2d 738 (Ala. 1990); Danley v. Murphy, 658 S. 2d 483 (Ala. Civ. App. 1994)

Frigidaire and Allgas are responsible for compensatory damages.Frigidaire knew of the fraud and had settled with others and purchased their defective clothes dryers back.

Fraud or misrepresentation may be proven through evidence of similar fraud/misreprsentation against others. Evidence of similar fraudulent acts is admissible to show the fraudulent intent, plan, or scheme, provided that act sought to be proven meets requirments of similarity in nature and proimaty in time. Shoals Ford, Inc. v. McKinney, 605 So. 2d 1197 (Ala. 1992) Keebler v. Winfield Carraway Hosp., 531 So. 2d 840 (Ala. 1988)

Frigidaire's attorney produced the report to Judge Jolley and claimed camera. After receiving the report in *camera*, the judge said it was work product. Jolley erred. If the defendant's did not know about the report, and again said that there was no report, how could it be a work product as Judge Jolley ruled This was not a work product and it was withheld from the plaintiffs and their attorney and the plaintiffs were denied due process and equal protection because this report should have presented to the plaintiff when they asked for it in discovery. This case parallels our case on records for the purpose of putting into evidence because unlike WCI in White Consolidated Ind. v. American Liberty, SC 1911560, April 2, 1993, the appellants have laid a predicate for their introduction before the lawsuit was filed, after the lawsuit was filed, and after summary judgment. The judge erred by not compelling Frigidaire, White Consolidated Industries, Inc.'s expert witness's

investigative report. At the time the Pyrotec investigator expert was hired by Crawford Insurance Co. for Frigidaire, a lawsuit had not been filed by Bobby W. Kennedy et al. Bobby Kennedy told the expert witness he could begin his investigation with a promise that he would provide a copy of the report to bobby Kennedy, and this promise was made before Bobby Kennedy agreed to allow him to perform an investigation. The Pyrotec investigator, Richard Keith, showed Bobby Kennedy the smoked glass in the room that contained the clothes dryer and told him the fire started in this room and removed the smoked up clothes from the dryer and marked them as exhibit one and these clothes showed they had been smoldering for some time before the propane gas was ignited by the defective clothes dryer and also showed him the other window glasses in the house that were not smoked up and stated that the smoked up window in the room that contained the clothes dryer showed that the smoke had been in that room for several hours in order to smoke and stain the glass in that room's windows.

In Dubert v. Merrell Dow Pharm, Inc. 509 U.S. 579, 592, 113 S. Ct. 2786, 2796, 125 L. Ed.2d 469 (l993) Dubert demand is that the trial judge makes a "preliminary assessment" of whether the proffered testimony is both reliable (i.e.based on "scientific knowledge") and helpful (i.e. of assistance to the trier of fact in understanding or determining a fact in issue) however; there is no requirement that the proffering party must "prove" anything to the court before the testimony in question can be admitted.

The original circuit judge stated in the first court hearing that the plaintiffs could not win in this court

without an attorney.

The basis of this petition for the writ is that a material question requiring decision was one of first impression in the appellate courts of Alabama and was incorrectly decided. The issue is whether the new circuit court judge, Judge Jolley,erred in granting summary judgment in favor of the defendants after a senior judge,Judge Jetton, had ruled that there are genuine issues of material fact and defendants motion shall be and are hereby overruled. The second judge,Judge Jolley, granted Motion to Continue Trial and on 6-3-99 reset for trial Sept 7,1999 at 9 :00 a.m. Frigidaire and White Consolidated Industries filed a motion for second summary judgment on 6-24-99 and Judge Jolley granted summary judgment when defendants refiled their motion for summary judgment. 8-30-99. The genuine issues of material facts had not changed in this case.Where a jury trial is requested, the circuit court is not free to decide factual issues, and if any material issues are present in the record , the court must deny the motion and proceed to trial. Warrior Tombigbee Trnasportation v. M/V Fung, 695 F.2d at 1296. "Summary judgment will not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the necessary nonmoving party." Anderson v. Liberty Lobby, Inc. 477 U.S.242, 248, l06 Ct 2505, 2510, 91 L.Ed.2d 202 (l986). The party seeking summary judgment bears the burden of demonstrating that there is no dispute as to any material fact in the case. Warrior, 695 F.2d at 1296. "In assessing whether the movant has met that burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the [non-moving] party"

and resolve ' all reasonable doubts about the facts . . in favor of the non-movant'" id (citation omitted). The plaintiffs requested trial by jury. The plaintiffs did have, as Judge Jetton stated, "genuine issues and material facts." The defendants themselves have not proved that the clothes dryer did not overheat and create an ignition source that was high enough to ignite the propane gas. The Alabama Supreme Court itself ruled that both the plaintiff and the defendant must prove their case "by substantial evidence". They basically ruled that the standards of proof needed to be identical for both parties .They ordered a new trial based on that. Brenda Cackowski v. Wal Mart, Supreme Court of Alabama Case 1981204, decision 1-21-2000. Wal Mart did not prove anything, the same as Frigidaire and Allgas.They offer no cause of the fire, etc.

3) Whether the circuit court judge was biased against the petitioners in not following Alabama laws in making a decision on the negligence, AEMLD, Spoliation, and product liability when the law is clear and that these issues can only be decided by a jury and whether the judge had a right to make a decision on the AEMLD claims when the defendant Allgas admitted that the plaintiffs had an AEMLD claim against Frigidaire and Allgas and the law requires it to go to a jury?

In White Consolidated Industries, Inc. et. al. v. American Liberty InsuranceCompany and Mary Evans McKinney, 1911540, Supreme Court of Alabama, April 2, 1993, expert testimony and testimony of homeowner that she saw flames coming out of back of clothes dryer supported verdict against

manufacturer's successor, even though expert testimony was conflicting. In appellants' case : 1) Don Weaver,next door neighbor, first witness on the scene, saw flames from propane tank spray fire across appellants' porch. Spoliation of evidence by Allgas removing tank from the fire scene and destroying parts and evidence before the state LP Gasboard investigator or plaintiffs or plaintiffs' expert witness could inspect fire scene. 3)AEMLD defective clothes dryer. Allgas admitted that plaintiffs had a claim under AEMLD .Expert witness of defendants stated that the fire started in the room that contained the clothes dryer. 5) expert witness of plaintiffs stated that the defective clothes dryer ignited the leaking propane gas and that destroyed the house. 6) plaintiff testified that he smelled gas in the night before the fire. 7)defendants' expert witness, Pyrotec, destroyed evidence by dismantling and destroying the clothes dryer and failed to give a copy of his report to the plaintiff. 8) plaintiffs produced substantial evidence in support of their claims and the defendants failed to produce any evidence contradicting the plaintiffs substantiating evidence as to the causal of the fire and the defendant or expert witness stated that the fire started in the room that contained the clothes dryer. The defendant failed to give any evidence as to the cause of the fire.

In July, Frigidaire announced a recall with an ad in major newspapers. It said, in controlled tests, they had identified a potential safety hazard, overheating and fire . Frigidaire offered to supply a new one, for $230." The heating element at the back of the dryer sagged and made contact with the back.The coil overheats and sags far enough to touch the plate, creating its own electrical circuit.So even when the

machine shuts off, the coil stays on, and on, getting hotter and hotter causing fires.

According to Gord Dawes, a serviceman, he states, "I think Frigidaire knows a lot more than what they're saying. basically, they tell me that the - there is a definite heater warping problem on these dryers, that when the heater sagging shorts out onto the frame, it can stay on and can start - has a potential of starting that fire. This can happen even if it is totally properly installed. Frigidaire had a partial fix with a switch.This is proof that Frigidaire had recalls on their dryers.

The appellants' Writ of Certiorari was denied by the Supreme Court and a review of the original petition for the Writ of Certiorari should be reviewed to direct the trial judge for relief. The appellant has requested a trial by jury because the trial judge wrongfully, with bias, was against the Pro Se appellants and against the AEMLD and spoliation claims could only be settled by a jury trial. This is as stated in ARCP Rule 21 :(1.) clear legal right of the appellant to the order sought. (2.) an imperative duty upon the respondent in perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy, and (4) properly invoked jurisdiction of the court.The Writ of Certirorai should be granted when there is a clear showing that in this case the Circuit Court violated the petitioners' due process and equal protection, abused its discretion, and exercised it in an arbitrary or copricious manner. Ex parte state ex rel McKinney, 575, So.2d 1024 (Ala. 1990) show how Jolley abused his discretion by not allowing a trial of the facts and issues and the defendants admission of an AEMLD claim of the appellant. Defendants spoliation of evidence that can only be settled by jury

trail.

The NFPA 921 Guide for Fire and Explosion Investigation, published by the National Fire Protection Association, states that the fire scene itself is considered to be evidence and "the examination and analysis of that fire scene is vitally important in determining the origin of the fire, the cause of the fire, and the responsibility for the fire " NFPA 921, S 9-3-1 , at p. 921-66 (1995 ed)

Courts have recognized the damaging effect to plaintiffs where the defendants like Frigidaire and Allgas destroyed the propane gas lines under the house and removed the propane tank and replaced damaged parts on the propane gas tank and painted it before it could be inspected by the state liquified petroleum gasboard inspector violated state law that all propane gas components are to remain at the fire scene. Courts have imposed sanctions for spoliation of evidence to instructing the jury that it may assume that any destroyed evidence would have been unfavorable to the spoliator. *Schmid v Milwaukee Electronic Tool Corp,* 13 F.3d 76, 78 (3d Cir. 1994); *Baliotis v. McNeil, 870 F. Supp. 1285 (M.D.Pa. 1994).* Only a jury can decide a defective clothes dryer with fraud on the recall and spoliation case . The circuit judge, Jolley, erred with assuming judgment against the plaintiff. The judge failed to allow the case to go to the jury and Allgas has not denied that they did not spoil evidence at the fire scene; therefore admitting guilt.

The defendant, Frigidaire's expert witness destroyed the clothes dryer by dismantling the dryer at the fire scene and was guilty of spoliation.

CONCLUSION

The petitioners ask this Honorable Supreme Court grant certiorari and vacate the Alabama Supreme Court's decision and send the case back to Alabama courts for a trial.

These petitioners have been defrauded out of justice by this circuit judge and these defendant attorneys and have been denied justice under the U.S. Constitution and pray for relief that this honorable court will allow this petition for a writ of certiorari.

Respectfully submitted, February 15 ,2001

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APPENDIX A - ORDER STRIKING THE APPLICATION FOR REHEARING AND TO REMAND TO CIRCUIT COURT FOR A TRIAL BY JURY, DATED DECEMBER 13, 2000

IN THE SUPREME COURT OF ALABAMA
December 13, 2000

1992165

Ex parte Bobby W. Kennedy, Carolyn S. Kennedy, and Jimmy Kennedy. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re : Bobby W. Kennedy et al. v. Frigidaire Inc., et al.) (Marshall Cir. Ct.No. : CV-97-150) (Low'r. App.Ct.No. : 2990444)

ORDER

IT IS ORDERED that the motion to set aside the order striking the application for rehearing and to remand to circuit court for a trial by jury filed in this cause on December 8, 2000, be, and the same is hereby, stricken.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this13th day of December, 2000.

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX B - ORDER STRIKING APPLICATION FOR REHEARING,DATED DECEMBER 1, 2000

IN THE SUPREME COURT OF ALABAMA
December 1, 2000

1992165

Ex parte Bobby W. Kennedy, Carolyn S. Kennedy and Jimmy Kennedy, PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re : Bobby W. Kennedy et al. v. Frigidaire Inc., et al.) (Marshall Cir.Ct.No. : CV-97-150) (Low'r.App.Ct.No. : 2990444)

ORDER

IT IS ORDERED that the application for rehearing filed in this cause on November 28, 2000, be, and the same is hereby, stricken in accordance with the provisions of Rule 39(1) , Alabama Rules of Appellate Procedure.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 1st day of December, 2000.

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX C - PETITION FOR WRIT OF CERTIORARI IS DENIED. NO OPINION, DATED NOVEMBER 17 , 2000

IN THE SUPREME COURT OF ALABAMA

November 17, 2000

1992165

Ex parte Bobby W. Kennedy, Carolyn S. Kennedy and Jimmy Kennedy. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re : Bobby W. Kennedy et al. v. Frigidaire Inc., et al.) (Marshall Cir.Ct.No.: CV 97-150 (Low'r.App.Ct.No.: 2990444)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied. NO OPINION.

MADDOX, J. - HOOPER, C.J., and Cook, Lyons, and Johnstone, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as sam appear(s) of record in said Court.
Witness my hand this 17th day of November , 2000.

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX D- APPLICATIN FOR REHEARING OVERRULED. 39 (k) MOTION DENIED DATED AUGUST 4, 2000

August 4, 2000

THE COURT OF CIVIL APPEALS OF ALABAMA

RE : 2990444

Bobby W. Kennedy et al. v. Frigidaire et al. (Appeal from Marshall County Circuit Cout, Guntersville Division : CV 97-150).

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals :

Application for Rehearing Overruled. No Opinion written on rehearing. 39 (k) Motion Denied.

John H. Wilkerson, Jr.
John H. Wilkerson, Jr. Clerk
Court of Civil Appeals

Court of Civil Appeals
300 Dexter Avenue
Montgomery, AL 36104-3741
(334) 242-4095

APPENDIX E - APPEAL FROM MARSHALL CIRCUIT COURT AFFIRMED, DATED JUNE 9, 2000.

June 09 2000

STATE OF ALABAMA - - -JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM, 1999-2000

2990444

Bobby W. Kennedy et al. v. Frigidaire, Inc., et al., Appeal from Marshall Circuit Court (CV-97-150)

CRAWLEY, Judge

AFFIRMED. NO OPINION

See Rule 53 (a) (1) and (a) (2) (F), Ala. R. App. P.; Rule 28, Ala. R. App. P.; Messr v. Messer, 621 So. 2d 1343 (Ala. Civ. App. 1993); and Bishop v. Robinson, 516 So. 2d 723 (Ala. Civ. App. 1987).

This case was transferred to this court by the Supreme Court pursuant to Ala. Code 1975, S 12-2-7(6).

Robertson, P.J., and Yates, Monroe, and Thompson, JJ., concur.

John H. Wilkerson, Jr. Clerk of the Court of Civil Appeals of Alabama, do hereby certify the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of

record in said court.

Witness my hand this 9th day of June, 2000.
John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals of Alabama

APPENDIX F - REQUEST FOR ORAL ARGUMENT DENIED, DATED MAY 31, 2000

May 31, 2000

THE STATE OF ALABAMA
THE COURT OF CIVIL APPEALS

2990444

Bobby W. Kennedy, et al. v. Frigidaire, et al. (Appeal from Marshall County Circuit Court, Guntersville Division : CV 97-150).

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals :

Pursuant to ARAP Rule 34, as amended, oral argument request, briefs, and record having been considered, the Court is of the opinion that oral argument is not necessary for proper disposition of this appeal.

Therefore, request for oral argument is denied, and the appeal is submitted on briefs as of this date.

John H. Wilkerson, Jr., Clerk
John H. wilkerson, Jr. Clerk
Court of Civil Appeals

Court of Civil Appeals
300 Dexter Avenue
Montgomery, AL 36104-3741
(334) 242-4093

APPENDIX G - APPELLANTS' AND APPELLEES' MOTIONS TO SUPPLEMENT THE RECORD IS GRANTED, DATED APRIL 4, 2000

April 4, 2000

THE COURT OF CIVIL APPEALS OF ALABAMA

RE : 2990444

Bobby W. Kennedy, et al. v. Frigidaire, et al.
(Appeal from Marshall County Circuit Court, Guntersville Division : CV 97-150).

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals :

Appellants' and appellees' motions to supplement the record are granted. Trial court clerk is directed to supplement the recrod on appeal.

John H. Wilkerson, Jr. Clerk
John H. Wilkerson, Jr., Clerk
Court of Civil Appeals

Court of Civil Appeals
300 Dexter Avenue
Montgomery, AL 36104-3741
(334) 242-4095

APPENDIX H - ORDER THAT THIS CAUSE IS TRANSFERRED TO THE COURT OF CIVIL APPEALS, DATED FEBRUARY 1, 2000

IN THE SUPREME COURT OF ALABAMA
February 1, 2000

1990695

Bobby W. Kennedy et al. v. Frigidaire et al.
(Marshall [Guntersville] Cir.Ct.No. : CV 97-150)

ORDER

IT IS ORDERED that this cause isi transferred to the Court of civil appeals pursuant to S 12-2-7, Code of Alabama 1975.

IT IS FURTHER ORDERED that further proceedings in this cause shall be filed with the Court of Civil Appeals pursuant to th rulels of procedure applicable to that court.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 1st day of February, 2000.
Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX I - - DOCKET SHEET LIST OF JUDGE'S DECISIONS DATED 9-28-99 TO 1-7-00

00011
CV-97-000150.00
JUDGE : HON. TIM JOLLEY

1-7-00 This Court's granting of summary Judgment was as to all defendants on all claims and the Summary Judgment of 8-30-99 is a final judgment because it disposed of all pending issues as to all parties. TJ

12-13-99 Concerning plaintiffs Motion to Compel White Industries, the discoverable documents were produced and on that was work product previously. Motion denied. T Jolley

00010
CV 97 000150.00
JUDGE : HON. TIM JOLLEY

12-7-99 After considering plaintiffs' Motion for New Trial/and/or to Alter, Amend and Vacate The Summary Judgment, together with all submissions and argument of counselor plaintiffs' Motion at the hearing held November 15, 1999, said motion is denied. T Jolley

10-7-99 Motion for New Trial, etc. set for hearing Nov. 5, 1999 at 8 :30 A.M. Cout Reporter to be present at hearing. T.J.

9-28-99 In response to the letter of Dan King dated sept 3, 1999, this Court did have all submissions when it granted summary judgment on 8-30-99. T. Jolley

APPENDIX J - - MOTION FOR NEW TRIAL AND/OR TO ALTER, AMEND AND VACATE THEE SUMMARY JUDGMENT ORDER AND REQUEST FOR ORAL ARGUMENT DATED 9-24-99

IN THE CIRCUIT COUT OF MARSHALL COUNTY, ALABAMA GUNTERSVILLE DIVISION

BOBBY W. KENNEDY, et al

PLAINTIFFS

VS. **CIVIL ACTION NUMBER : CV-97-150J**

FRIGIDAIRE COMPANY, et al.

DEFENDANTS

MOTION FOR NEW TRIAL AND/OR TO ALTER AMEND AND VACATE THE SUMMARY JUDGMENT ORDER AND REQUEST FOR ORAL ARGUMENT

Come now the plaintiffs, by and through counsel, and move this Honorable Court, pursuant to Rule 59 of the ARCP, for the Court to enter an Order granting a new trial and/or altering, amending and/or vacating the summary judgment entered by the Court

FILED
Sep 24 1999
Sherry G. Griep
Clerk of the Circuit/District Court Marshall County Alabama

on the 30th day of August, 1999, and request *oral arugment*. For grounds the plaintiffs show this Honorable Court the following :

1. That the affidavits and other exhibits filed by the plaintiffs were not untimely filed and should not have been stricken. that the affidavit of plaintffs' exper does not contradict his deposition testimony and should not have been stricken for that reason. If the Court looks at the deposition of Steve Holich, plaintiff's independent expert, he testified under oath exactly as he did in his affidavit that the clothes dryer of the defendant caused the propane gas to ignite causing the fire (See Steve Holich deposition page 193.) At page 213 of Steve Holich's deposition he testified as he continued to testify all through his deposition that, it was his opinion that the clothes dryer started the fire. From 193 through the end of the deposition, Steve Holich, continued to testify to various things that he believed supported his opinion, as aforesaid. One thing that he testified proved without a doubt that the fire in fact started inside the house and did not start outside the house as the defendants' expert claim was that the house window glass was in fact smoke stained from the inside in the corner room closest to the dryer. See page 213.

The fact that even the defendant's attorney of record knows after reading plaintiffs' indipendent experts', Steve Holichs' deposition, that it was in fact Steve Holich's deposition testimony that the fire was started by the clothes dryer. See the defendnat's Lampton Love, Inc., et al. memorandum brief in support of their Motion for Summary Judgment, page 8 paragraph 15 "as to the cause of the fire, Steve

Holich testified that in his opinion the fire started when propane leaked from a point inside the house and was ignited by the clothes dryer. (S. Holich depo., page 193). The plaintiff's submitted sufficient legal evidence affidavits, etc., in a timely fashion and the evidence clearly shows that there are genuine issues of material facts so that summary judgment should not be granted as a matter of law. The plaintiff's legal evidence affidavits, etc., were in fact filed in a timely fashion as aforesaid and the Court did in fact give leave to the plaintiff's attorney of record to serve the defendants' attorney of record with copies of the plaintiffs affidavits, etc. did give plaintiffs attorney of record leave to serve defendants' attorney of record with those exhibits within a period of 7 days from August 23, 1999, and that was in fact done. The defendant, Lampton Love, Inc., et al. attorneys of record , in their memorandum brief in support of their Motion for Summary Judgment in fact admitted just as the plaintiffs contend that the plaintiffs' indipendent expert Steve Holich did in fact, in his deposition, give testimony that was his opinion that the fire was started by the clothes dryer. See Lampton Love, Inc., et al., memorandum brief in support of Motion for Summary Judgment, page 8, paragraph 15 "as to the cause of the fire, Steve Holich testified that in his opinion the fire started when the propane leaked from a point inside the house and was ignited by the clothes dryer." (S. Hollich depo., p. 193)

2. That the plaintiffs produced legal evidence that reveal that there are in fact genuine isisues of material fact so that Summay Judgment should not

have been granted as a matter of law. In Goodwin vs. Barry Miller Chevrolet, Inc. 543 So. 2d 1171 (Ala. 1989), where the Supreme Court held that the Trial Judge committed error by not considering the plaintiff's deposition when he ruled on the Motion for Partial Summary Judgment. The deposition was part of the record and allegedly stated genuine issues of material fat that precluded the granting of summary judgment and the Supreme Court wen on to hold that a Trial Judge must considr all the evidence before him, including depositions. The standard of whether or not a Motion for Summary Judgment should be grnated has been the same for a long period of time. The Supreme Court of Alabama in Tobert vs. Gulsby stated in a Motion for Summary Judgment all reasonable inferences from the facts are viewed most favorably to the non moving party and the moving party is required to establish that the other party could not recover under any discernable circumstances . Tolbert vs .Gulsby, 333 So. 2d 129 (Ala. 1976). Under Alabama law where the trial court enters summary judgment there is no presumption on appeal of correctness of the Trial Court's finding and the review isi de novo. Macy vs. American Shelf Company, 528 So.2d 684 (Ala. Civ. App. 1993)

3. That the legal evidence submitted to the Court by the plaintiffs that was in fact timely filed and of record when viewed in the light most favorable to the plaintiffs/non-movants, clearly establishes that there are in fact genuine issues of material fact so that summary judgment should not be granted in the defendant's favor as a matter of law, so that the summary judgment of the Court is

contrary to the evidence presented to thee Court and the law of Alabama.

WHEREFORE, premises considered, plaintiffs request this Honorable Court to allow additional oral argument with respect to this Motion and following hearing, the plaintiffs request this Honorable Court to set aside the Order of Summary Judgment of August 30, 1999, and allow the plaintiffs to try their claims as against the defendants by jury as this would best serve the intrest of justice.

BY:_____
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ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing were placed in the opposing counsel's box in the Etoway County Clerk's Office and/or mailed U.S. Postage prepaid, on this the 24 day of September 1999.

Daniel King
Of Counsel

APPENDIX K - - ORDER GRANTING SUMMARY JUDGMENT DATED 8-30-99

IN THE CIRCUIT COURT OF MARSHALL COUNTY, ALABAMA

BOBBY W. KENNEDY, et al.
PLAINTIFFS,

VS. CASE NO. CV 97-150-J

FRIGIDAIRE COMPANY, et al.,
DEFENDANTS.

ORDER GRANTING SUMMARY JUDGMENT

The Court, after considering argument of counsel, pleadings, depositions, affidavits, and other submissions, finds the following :

1. The affidavits filed by plaintiffs were untimely filed and are stricken. Further the affidavit of plaintiffs' expert contradicts his deposition testimony and is stricken also for that reason.

2. The deposition of plaintiff's expert (taken beefore the affidavit was given by him) indicates that there is nothing more than mere speculation as to several possible causes of the fire and no defect of any manufactured product of any defendant was shown to exist. further there was no probable cause shown as to the cause of the fire as a result of any defendant's negligence.

3. Plaintiffs' failure to produce substantial evidence in support of their claims entitle defendants

to a judgment as a matter of law.

4. There is no genuine issue as to any material fact and defendants are entitled to a judgment as a matter of law. Summary judgment is GRANTED in favor of the defendants and against the plaintiffs.

5. Costs are taxed as paid.

DONE this 30th day of August, 1999.

Tim Jolley
Tim Jolley
Circuit Judge

FILED
Aug 30 1999

Sherry Griep
Clerk of the Circuit/
District Court ,
Marshall County, Alabama

cc : Wilson
Christie
Motlow
King
8-31-99

(2)

Supreme Court, U.S.
FILED
MAR 22 2001
CLERK

No. 00-1334

IN THE

Supreme Court of the United States

BOBBY W. KENNEDY, ET AL.,
Petitioners,

v.

FRIGIDARE COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES TO THE PROCEEDING AND RULE 29. 6 CORPORATE DISCLOSURE STATEMENT

Petitioners, who were plaintiffs in the underlying lawsuit, are Bobby W. Kennedy, Carolyn J. Kennedy, and Jimmy P. Kennedy. Defendants were Frigidaire Company, White Consolidated Industries, Inc., Russ Ashley, Crawford & Company, Richard Keith, Pyrtech Company, Lampton-Love, Inc., Allgas, Inc., C.L. Jimmy Fortenberry, Ronald Wayne Puckett, Bruce Laviner, and Sam's Club Inc., a division of Wal-Mart Stores, Inc.

This Brief is filed on behalf of White Consolidated Industries, Inc. and Frigidaire Company. White Consolidated Industries, Inc. is a wholly-owned subsidiary of A. B. Electrolux of Stockholm, Sweden. Electrolux is traded on the NASDQ as ELUX.

Frigidaire is a trade name for products manufactured and marketed by White Consolidated Industries, Inc.

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REASONS THE WRIT SHOULD BE DENIED

INTRODUCTION

The Kennedys' Petition for Writ of Certiorari seeks review of a summary judgment entered against them by an Alabama state trial court in a products liability case. The issues before the trial court solely involved the application of well-settled Alabama state law to the evidence presented. After summary judgment was entered against the Kennedys, they pursued an appeal in the Alabama Court of Civil Appeals.[1] That Court affirmed the summary judgment without issuing an opinion. Dissatisfied with that result, the Kennedys then sought certiorari review in the Supreme Court of Alabama, which denied their petition without opinion. Through their Petition filed in this Court, the Kennedys now ask this Court to review the summary judgment. As will be explained, Respondents White Consolidated Industries and Frigidaire (collectively hereafter "White Consolidated") believe that the Kennedys' Petition should be rejected because no substantial arguments concerning federal law were ever pursued by the Kennedys at the state court level, because none of the Alabama state courts in which the Kennedys have pursued this litigation ever passed on a matter of federal law, and because the summary judgment entered against the Kennedys

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[1] The Kennedys filed their Notice of Appeal in the Alabama Supreme Court, which then transferred the appeal to the Alabama Court of Civil Appeals pursuant to ALA. CODE § 12-2-7. That provision of the Alabama Code allows the Alabama Supreme Court to transfer an appealed civil case to the Alabama Court of Civil Appeals for decision, subject to certain enumerated exceptions which do not apply to this case. Once the Court of Civil Appeals has decided the case, it is then subject to discretionary review by the Alabama Supreme Court on a Writ of Certiorari. *See,* ALA. R. APP. P. 39.

did not infringe upon their rights under federal law and the United States Constitution.

This lawsuit originated with a Complaint which the Kennedys filed *pro se* in the Circuit Court of Marshall County, Alabama, seeking damages from Frigidaire Company, White Consolidated, Russ Ashley, Crawford & Company, Richard Keith, Pyrtech Company, Lampton-Love, Inc., Allgas, Inc., C. L. Jimmy Fortenberry, Ronald Wayne Puckett, Bruce Laviner, and Sam's Club, Inc. The essence of the Kennedys' claims against White Consolidated was that a defective clothes dryer manufactured by White Consolidated started a fire which burned their lake house.[2] After they filed suit, the Kennedys retained counsel, and were represented continuously thereafter until summary judgment was entered in favor of the defendants and the Kennedys' motion for post judgment relief was denied. The Kennedys then discharged their attorneys and began to prosecute *pro se* the appeal which has culminated in this Petition for Writ of Certiorari.

At the conclusion of briefing in the Alabama Court of Civil Appeals, that court affirmed the summary judgment without issuing an opinion, pursuant to ALA. R. APP. P. 53(a)(1) and ALA. R. APP. P. 53(a)(2)(F). These rules permit an Alabama appellate court to affirm a judgment or order of a trial court in a civil case without opinion if the appellate court determines that an opinion in the case "would serve no significant precedential purpose" and that the trial court's judgment or order "was entered without an error of law."

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[2] The lake house was unoccupied at the time of the fire. (C-743; p. 28).

The Court of Civil Appeals also clearly indicated that the Kennedys had failed to properly present and support any arguments which would warrant reversal of the trial court. In its Order affirming the summary judgment, the Alabama Court of Civil Appeals cited without discussion its prior opinions in *Messer v. Messer*, 621 So. 2d 1343 (Ala. Civ. App. 1993) and *Bishop v. Robinson*, 516 So. 2d 723 (Ala. Civ. App. 1987). In *Messer*, the Court of Civil Appeals affirmed a trial court judgment because it determined that the appellant's failure to properly present arguments in his brief resulted in a waiver of appellate consideration. Although the Court of Civil Appeals did reach the merits of the child custody dispute at issue in *Bishop*, it noted in its opinion that the appellant had failed to present issues to the Court "with clarity and without ambiguity." *Id.* at 724, *quoting, Thoman Engineering, Inc. v. McDonald*, 57 Ala. App. 287, 328 So. 2d 293 (Ala. Civ. App. 1976). Given the incongruity of the substantive issues before the Court in the Kennedys' case and those implicated by the appeal in *Bishop*, the Alabama Court of Civil Appeals presumably cited the *Bishop* opinion to point out the Kennedys' failure to properly present any arguments in support of their appeal.

SUMMARY OF THE ARGUMENT

White Consolidated does not believe that this case is one that is appropriate for this Court's certiorari review for several reasons. First, at least as it relates to the summary judgment entered in favor of White Consolidated, the Kennedys' appeal is one which involves claims asserted under the Alabama common law of products liability. The matters about which the Kennedys complain relate solely to the trial court's application of well-settled propositions of law to the facts and evidence.

Second, the briefs filed by the Kennedys in Alabama state court were technically inadequate and failed to present any substantial arguments of state or federal law. The Kennedys merely mentioned in passing the United States Constitution and federal civil rights laws without presenting any properly supported arguments to demonstate how their rights under federal law were violated in the trial court.

Third, the essence of the Kennedys' claims in both the state courts and now in this Court is that they were deprived of justice when the trial court entered summary judgment against them. This Court has long recognized the legitimate field of operation of summary judgment procedure. Summary judgment was appropriate in this case, and the Alabama courts have so recognized.

I. THIS COURT SHOULD DENY THE KENNEDYS' PETITION BECAUSE THE ALABAMA STATE COURTS DID NOT ADDRESS ANY ISSUE OF FEDERAL LAW IN THEIR DISPOSITION OF THE KENNEDYS' LAWSUIT, AND BECAUSE THE KENNEDYS FAILED TO PROPERLY PRESENT AN ISSUE OF FEDERAL LAW IN THE ALABAMA STATE COURTS.

This Court has held that the proper presentation of a claim under federal law is usually a prerequisite to certiorari review of a state court decision. As this Court noted in *Adams v. Robertson*, 520 U.S. 83, 86 (1997):

> With 'very rare exceptions'. . . we have adhered to the rule in reviewing state court judgments under

> *28 U.S.C. § 1257* that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. [citation omitted].

Although their Petition is somewhat difficult to follow, it does not appear that the Kennedys have attempted to demonstrate to this Court that a federal question was addressed by an Alabama state court. The Kennedys could not make such a showing, in any event.

In *Webb v. Webb*, 451 U.S. 493, 495 (1981), this Court stated as follows:

> . . . [w]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

The Alabama state courts did not pass on any matters of federal law in affirming the summary judgment. Accordingly, under this Court's holding in *Webb*, the Kennedys must affirmatively demonstrate that they properly presented a federal question to the state courts.

In the Notice of Appeal filed by the Kennedys following the trial court's entry of the summary judgment, the only reference they made to federal law was the assertion that the entry of the summary judgment against them violated "the plaintiffs' state and federal right [sic] . . . ." (C-1433). In their initial and reply briefs to the Alabama Court of Civil Appeals, the Kennedys did not cite any federal statutes or the Constitution of the United States. They further discussed no federal case law in arguing for reversal of the summary judgment

other than citing two federal cases for the general proposition that they were entitled to have the evidence viewed in a light most favorable to them as the non-moving party.[3] (Reply Brief of Appellant, p. 20). In their initial brief to the Alabama Court of Civil Appeals, the Kennedys contended that their "civil and constitutional rights" were violated by the trial court's admonition to the Kennedys that they should not attempt to prosecute their lawsuit *pro se*, by the trial court's resolution of a discovery dispute, and by entry of the summary judgment. (Brief of Appellants, pp. 2; 6; 11; 49). At one point in that same brief, the Kennedys also asserted that the trial court's decision to grant summary judgment was a violation of their "state and federal constitutional rights." (Brief of Appellants, p. 21). The only arguments made by the Kennedys on the merits of this claim, however, involved whether the summary judgment was correct under Alabama precedent. In their reply brief to the Court of Civil Appeals, the Kennedys contended at one point that their "civil rights have been violated in this case" but once again, they failed to present any arguments under federal law to support that contention. (Reply Brief of Appellants, p. 8). The Kennedys' arguments concerning the actions taken in the trial court were couched solely in terms of state substantive law. Not only did the Kennedys fail to present any arguments to the Court of Civil Appeals concerning the manner in which their rights under federal law were implicated, the citations included in the Order of the Court of Civil Appeals affirming the summary judgment without opinion indicated that the

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[3] *Rollings v. TechSouth, Inc.*, 833 F.2d 1525 (11th Cir. 1987); *Barnes v. Southwest Forest, Inc.*, 814 F.2d 607 (11th Cir. 1987).

Kennedys had failed to present cogent and adequately supported arguments on their claims under state substantive law as well.

Once the Alabama Court of Civil Appeals affirmed the summary judgment, the Kennedys then sought discretionary certiorari review in the Alabama Supreme Court. In their Petition and Supporting Brief, the Kennedys were somewhat more specific in referring to federal constitutional and statutory claims. (Writ of Certiorari Brief, p. 4; 8, 9; 11). They contended that the entry of the summary judgment against them violated their "constitutional rights to a fair access to the court. Federal Constitutions Civil Rights Act 1964, Title VII and the Fourteenth Amendment to the U. S. Constitution and the Alabama Constitution under due process and discrimination [sic]." (Writ of Certiorari Brief, p. 9). They also stated that the trial judge was "biased against them" and that they were "retaliated against" by the trial judge in violation of "the Equal Protection Clause" and "The Civil Rights Act of 1964 the U. S. Constitution and the amendment of 1991 under Title VII." (Writ of Certiorari Brief, p. 11). Once again, however, the Kennedys attempted to support their arguments with state substantive law.[4] As this Court reaffirmed in *Adams v. Robertson*, *supra*, when a state court fails to

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[4] The Kennedys did cite *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), *Warrior Tombigbee Transp. Co., Inc. v. M/V Fung*, 695 F.2d 1294 (11th Cir. 1983), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 2421 (1986) in their "Writ of Certiorari Brief," but cited no authority to support any conclusion that their rights under federal law had been infringed. (Writ of Certiorari Brief, pp. 7; 10). These federal court opinions were cited for general propositions of law concerning the standards for admission of expert testimony and for granting or denying a motion for summary judgment.

address a federal question later presented to this Court on petition for writ of certiorari, the petitioner must overcome a presumption that the federal issue was not properly presented to the state court "by demonstrating that the state court had a 'fair opportunity to address the federal question that is sought to be presented here.'" *Id.* at 86, 87. The Kennedys have failed to rebut that presumption, and this Court should deny their Petition for Writ of Certiorari.

II. THE ACTIONS COMPLAINED OF BY THE KENNEDYS DO NOT AMOUNT TO VIOLATIONS OF THEIR FEDERAL CONSTITUTIONAL RIGHTS OR OF ANY FEDERAL STATUTE.

The summary judgment which the Kennedys seek to overturn was entered against them by the trial court in accordance with Rule 56 of the Alabama Rules of Civil Procedure. That rule is substantially the same as its federal counterpart. White Consolidated presented a properly supported Motion for Summary Judgment to the trial judge. The Kennedys failed to introduce sufficient evidence in opposition to that Motion to demonstrate the existence of a genuine issue of material fact. Specifically, the Kennedys' proffered expert witness admitted that he was "speculating" about what might have caused the fire at the Kennedys' lake house.[5] (C-486; p. 181). Moreover, the Kennedys failed to present any properly authenticated evidence to support the claims they have continued to make in this Court concerning product recalls. In particular, the Kennedys

[5] The local fire marshal testified that the dryer was not located at the fire's point of origin, and that he believed the fire was caused by a defective ceiling fan. (C-754, 755, pp. 32; 34; 36; 38).

failed to demonstrate that those recalls related to the specific model of dryer which they had purchased for their lake house. This Court has recognized the propriety of a trial court's entry of summary judgment under FED. R. CIV. P. 56 in a "run-of-the-mill civil case" when a plaintiff fails to present evidence from which "a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1985).

Unquestionably, the proper employment of summary judgment procedure does not deprive a litigant of the right to trial by jury. Moreover, this Court has explicitly recognized the salutary purpose served by summary judgment procedure:

> The Federal Rules of Civil Procedure have for almost fifty years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

The Kennedys' claim that their rights under federal law and the United States Constitution were violated by the trial court's entry of summary judgment has no merit.

After the Kennedys lost their case in the Alabama Court of Civil Appeals, they claimed for the first time in their Petition for Writ of Certiorari to the Alabama Supreme Court that summary judgment should not

have been granted against them because of two prior holdings of the Alabama Supreme Court, *White Consolidated Ind., Inc. v. Wilkerson*, 737 So. 2d 447 (Ala. 1999), and *White Consolidated Ind., Inc. v. American Liberty Ins. Co.*, 617 So. 2d 657 (Ala 1993). (Writ of Certiorari Brief, pp. 2, 3; 5, 6; 12). The Kennedys claimed in their Petition for Writ of Certiorari to the Alabama Supreme Court that they were entitled to present their claims to a jury simply because the underlying lawsuits in *Wilkerson* and *American Liberty* were tried to a conclusion before juries. According to the Kennedys, they did not receive a measure of justice equal to the plaintiffs in those cases. The Kennedys appear to be making that same argument to this Court, and that argument is incorrect. The disposition of the *Wilkerson* and *American Liberty* cases has no bearing on the Kennedys' claims.

Wilkerson, *supra* involved a fire allegedly caused by an air conditioner, not a clothes dryer. *Id.* at 448. The plaintiffs presented definitive "cause and origin" evidence linking the air conditioner to the fire. *Id.* at 448. Likewise, in *American Liberty*, *supra*, the homeowner plaintiff testified that she had seen flames coming out of the back of the allegedly defective clothes dryer. *Id.* at 662. That dryer was not the same make or model as that upon which the Kennedys have based this lawsuit. These very important differences make the decisions in *Wilkerson* and *American Liberty* irrelevant to the summary judgment entered in the Kennedys' case.

White Consolidated is mindful of the workload of this Court and does not wish to add unnecessarily to that burden by engaging in excessive rejoinder to the unsupported assertions made in the Kennedys' Petition. Nevertheless, White Consolidated does not want to run

afoul of U.S. SUP. CT. R. 15.2, which admonishes the respondent to point out any perceived misstatements made in a Petition for Writ of Certiorari. Consequently, White Consolidated notes its disagreement with the Kennedys' assertion of judicial bias and their claims of dishonesty on the part of both the trial court and counsel for White Consolidated. The Kennedys' Petition to this Court refers to statements made by the trial court to the Kennedys, advising them to retain counsel to prosecute their lawsuit. Those statements do not, as the Kennedys claim, indicate that the trial judge was biased against them. Rather, the statements were made to the Kennedys in order to attempt to ensure that their claims were fully and properly presented in court by trained counsel. The Kennedys heeded this advice and retained counsel which represented them capably up to the point at which the Kennedys elected to continue their litigation through the state and federal appellate court systems.

White Consolidated also feels compelled to point out that the accusations made in the Kennedys' Petition of unlawful withholding and concealment of evidence by White Consolidated's counsel are unfounded. White Consolidated interposed valid objections to certain discovery requests made by the Kennedys' counsel. After reviewing *in camera* a submission made by White Consolidated in the course of resolving those objections, the trial court determined that the objections were well taken.[6] This determination was made against the

[6] The Kennedys first notified White Consolidated about the fire approximately a year and a half after it occurred by sending a letter to White Consolidated. By then, the fire scene had already been examined twice by Mr. Kennedy's co-worker Steve Hollich, who the Kennedys eventually designated as their expert witness.

Continued on next page

backdrop of Alabama law concerning the proper scope of discovery in civil cases and it did not result in any infringement on the Kennedys' rights under federal law or the United States Constitution.

Footnote 6 continued

In response to this letter, White Consolidated retained Crawford & Company to investigate. Crawford & Company then retained Pyrtech to inspect the fire scene. Mr. Richard Keith of Pyrtech later wrote White Consolidated a letter, slightly over a page in length. In that letter, Mr. Keith stated that while exposure to the elements had degraded the dryer, he did not believe that the dryer caused the fire. After *in camera* review of that letter, the trial court sustained White Consolidated's objection to producing it. The Kennedys are referring to this letter when they accuse White Consolidated's counsel of withholding evidence and lying to the trial court. (White Consolidated's Response to Appellants' "Motion to Complete Official Court Record Transmitted To The Appeals Court").

CONCLUSION

The matters presented by the Kennedys' Petition for Writ of Certiorari do not warrant this Court's review. Their Petition should be denied.

Respectfully submitted,

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Case No. : 00-1334

In The

SUPREME COURT OF THE UNITED STATES

BOBBY W. KENNEDY, et al.

Petitioners

v.

FRIGIDAIRE COMPANY, et al.

Respondents

On Petition for Writ of Certiorari
To The Supreme Court of Alabama

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The petitioners' Reply To Brief In Opposition represents the respondents' Briefs in Opposition to the Petition for Writ of Certiorari combined .

I. THE ALABAMA STATE COURTS DID ADDRESS THE FEDERAL LAW ISSUES PUT BEFORE THEM IN THE WRIT OF MANDAMUS AND PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT, APPEALS COURT, AND THE SUPREME COURT OF ALABAMA.

The courts had the opportunity to address the federal law issue and instead denied the state Writ of Certiorari.

The defendant, Frigidaire, et al.'s, statement in their brief in opposition to petition for writ of certiorari, page 2, that the petitioner's retained counsel after they filed suit is without merit. It was not until 6 months into the case (C 00003 - 00006) that the petitioners retained counsel and only after the petitioner's were told by the Circuit Court Judge, Judge Jetton, that they could not win in his court Pro Se. The defendant's, Frigidaire et al., having been duly served with the summons and complaint and not being an infant or an unrepresented incompetent person and having failed to plead or otherwise defend, and his default having been duly entered by the Pro Se Plaintiffs , the defendants made a motion

to have the entered default judgment set aside . (C-00107) In the hearing to argue the set aside of the entered default judgment , the judge stated the Pro Se Plaintiffs could not win a case in this court because they did not have an attorney. The Pro Se plaintiffs were also given no chance for discussion or argument concerning the set aside of the default judgment during the argument hearing June 20, 1997. (C00106) In the Motion for Writ Of Mandamus to Not Grant The Set Aside the Entered Default Judgement,dated July 28, 1997, the Pro Plaintiffs stated their civil rights were violated under the 1st, 5th, and 14 amendments to the United States Constitution and the Alabama Constitution. (C 00105 par 2)The Pro Se Plaintiffs filed on June 30, 1997, a motion to reconsider the order to set aside the entered default to ask the court's permission to be heard and present this written argument since no oral argument was allowed in objection to the order to set aside the default judgment. (C 00194)

The plaintiffs discharged their attorneys (C 00269) for failure to properly take discovery and for aiding and abeting the defendant, Frigidiare, by dismissing their expert witness from the case who was Pyrotec and Richard Keith, the investigator who promised the petitioners they would get a copy of the investigative report if they would allow him to investigate the fire scene and after he promised, the petitioners allowed him to inspect the fire scene and he showed the plaintiff, Bobby Kennedy, smoked glass from the room that had the clothes dryer and said that the fire started in this room. (C 01315, par. 6) The defendant would not give the promised report to the plaintiff and said that the report does not

exist, but when the circuit court judge requested it, it was discovered and the court was told there was an investigative report . The defendant, Frigidaire also told the court there were no recalls on the clothes dryers when it had been recalled for causing l00,000 fires.

The respondent, Frigidaire et al., admits on page 7 of the respondent's Brief that the petitioner had claimed the due process. The respondent stated:

"the Kennedys were somewhat more specific in referring to federal constitutional and statutory claims. (Writ of Ceertiorari brief, p.4; 8, 9 ; 11). They contended that the entry of the summary judgment against them violated their "constitutional rights to a fair access to the court. Federal Constitutions Civil Rights Act l964, Title VII and the 14th amendment to th U.S. Constitution and the Alabama Constitution under U.S. Constitution and th Alabama Constitution under due process and discrimination." "the trial judge was "biased against them" , "they were "retaliated against" by the trial judge in violation of "thee equal Protection Clause" and "The Civil Rights Act of l964 the U.S. Constitution and thee amendment of l991 under Title VII." (Writ of Certiorari Brief, p. 11).

The federal question was in the Writ and Briefs to the Appeals Court, Supreme Court, and State Court and Writ of Mandamus.

The Respondent, Frigidaire et al.'s, statement that the petitioners did not cite citations to the authorities that support his contentions are without merit . The petitioners followed Rule 28, Alabama Rules of Appellate Procedure and cited in their Brief,

Petition, and Writ to the Alabama Courts in the argument portion of their briefs, petition, and writs, the citations to the authorities that support his contentions of federal constitutional violations of his first, fifth, and 14 amendments to the U.S. Constitution, his due process and equal protection of his civil rights under the Civil Right Act and Title VII , and the summary judment by the trial judge, was due to be voided. see Harris v. Harris , 528 So. 2d, 866, (Ala Civ. App. 1988,) and Anderson v. Liberty Lobby, Inc. 477 U.S. 141, 148, 106 S Ct 2505, 2510, 91L. Ed. 2d. 202 1986. Reference pages in the record . C 00105, page 2, 2nd par.Writ of Mandamus to not Set Aside the Entered Default Judgement.

II. THE ACTIONS OF THE DEFENDANTS AND ALABAMA COURTS ARE VIOLATIONS OF THE PETITIONERS' FEDERAL CONSTITUTIONAL RIGHTS, FEDERAL LAWS, AND STATUES.

The respondent, Frigidaire et al., stated the Kennedy's proffered expert witness admitted that he was "speculating" (pg. 8 , respondents' brief)about what might have caused the fire. This statement was without merit . The petitioners ' expert witness stated in deposition and affidavits that the fire started in the clothes dryer. (C 00606,p. 179 , C 01332, C 00486, p.181, Lines 14-17, and C 01272).

The respondent, Frigidaire et al, stated the local fire marshall testified that the dryer was not located at the fire's point of origin. (p.8, respondents' brief)

The fire started in the room that housed the clothes dryer as admitted by the defendant, Frigidaire et al.'s expert witness that said the fire started where the glass was smoked up.
(C 01368) Respondent in his brief in opposition to petition for Writ of Certiorari admitted they had recalls on the clothes dryer and they were not the same model; however they had denied the recalls when asked about recalls in discovery and stated to the court they had not had any recalls.

The petitioners were treated differently and their equal protection and due process of the 14th amendment to the U.S. Constitution and civil rights were violated when summary judgment was given to the respondents.The Alabama Supreme Court did not apply the correct standard in reviewing the Court of appeals and the Circuit Court in granting of summary judgment.

(a) Summary judgment will not lie if the dispute about a material fact is "genuine", that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment state, the trial judge's function is not himself to weigh the evidence [477 U.S. 242, 243] and determine the truth of the matter but to determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. The Frigidaire Co. had recalls in Canada on the clothes

dryer that caused the fire that burned the petitioners house down and did not notify the petitioner that this same clothes dryer would short out by the heating element sagging and touching the metal of the dryer causing it to stay on and catch fire after the timer had shut off. Frigidaire had offered a switch in the recall to fix the problem but never told the petitioner or others in the U.S.A. See Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986).

All of Frigidaire's clothes dryers manufactured by White Consolidated Industries have the same design and the only difference is the name they place on the dryer - Kelvinator, White westinghouse, Frigidaire, Gibson, etc.

The petitioners asked for the report of the Frigidaire investigator and records in interrogatories and was denied this by both Allgas and Frigidaire and was told they did not have any record and refused to supply the record. Reference to appellants' Writ of Certiorari Brief in the Supreme Court of Civil Appeals of Alabama, p. 18 and 19 . The attorneys for Frigidaire misrepresented the fact to the judge in a hearing on Nov. 5, 1999 by saying he did not know of a report, but would look for one. (CR 16, In 10-11). Frigidaire had paid Pyrotec and Crawford Insurance Co. to investigate and prepare the report as admitted in a tape conversation with Richard Keith, Pyrotec investigator, and Dan King, appellants' attorney, where Richard Keith admitted that he had notes, report on the investigation and would not supply without a subpoena. Dan King prepared a Motion to Subpoena the report and evidence and the judge refused to sign the order to

subpoena.

Even the respondents, Frigidaire et al., answers to the 5th 6th and 7th answer to the petitioners law suit complaint were unconstitutional violations of the 8th and 14th amendment due process clause of the U.S. Constitution (C 00020) making this a constitutional issue from the beginning.

III. THE PETITIONERS DEMONSTRATED THAT FEDERAL QUESTIONS EXISTED

This court has jurisdiction to review the judgment of the Supreme Court of Alabama by Writ of Certiorari pursuant to 28 U.S.C. 1257. The petitioners also have the right to have this case redressed under U.S. constitutional authority of the 5th and 14th amendment.

IV. THE PETITIONERS PRESERVED FEDERAL ISSUES AND ADDRESSED SUCH ISSUES BEFORE THE TRIAL COURT AND ALABAMA APPELLANT COURTS

The jurisdiction for this case to be heard by the U.S. Supreme court is under the 5th amendment and 14th amendment to the U.S. constitution and other federal laws and statutes and other civil rights laws.

The petitioners constitutional rights were violated by the Alabama courts when they allowed the summary judgment to stand in violation of the petitioners constitutional right to due process and equal protection under the 5th and 14th amendment to the U.S. Constitution.

V. THE PETITIONERS CLAIMS DO CONSTITUTE FEDERAL CONSTITUTIONAL VIOLATIONS.

Judge Jetton, senior judge, stated in the record (C 00008) there are genuine issues for material facts and the defendants motion should be and are hereby overruled. Set for status Jan 15 ,1998 . Anderson v. liberty Lobby, inc., 477 U.S. 242 (1986) states there must be no material fact of law in dispute. This case works equally to the advantage of the petitioners.

Respondant's attorney, Ward Wilson, admits (CR-18,par.3), "As to their claims against Allgas and other related defendants, they have got an AMELD claim just as they've got one against the dryer company." Allgas was also guilty of spoliation when they removed the tank before the petitioners, their expert witness, or th LP gasboard inspctor could inspect the tank at the fire scene. (C 01282) Allgas removed the regulator and other parts on the tank and repainted the tank before it could be inspected.

In Dubrt v. Merrell Dow Pharm, Inc. 509 U.S. 578, 592, 113 S. Ct. 2786, 2796, 125L. d.2d 469 (1993) Dubert demand is that the trial judge makes a "preliminary assessmnt" of whether the proffered testimony is both reliable (i.e. based on "scientific knowledge") and helpful (i.e. of assistance to the trier of fact in understanding or determining a fact in issue) however ; there is no requirement that the proffering party must "prove" anything to the court before the testimony in question can be admitted.

The petitioners had an AEMLD claim as admitted by the respondents, there had been recalls

on the clothes dryer, the senior judge stated the petitioners had genuine issues for material fact, Allgas did not deny spoliation by removing the tank from the fire scene, replaced parts, and painted the tank before it could be inspected . The petitioners were denied due process under the 14th amendment of the U.S. Constitution.

The respondents evidence is without merit and the respondents and these Alabama courts have attempted to steam roll these Pro Se petitioners from the beginning to the end of this case by denying recalls, and investigative reports until after the summary judgment was granted. Summary judgment was wrong and this case should have been tried by a jury and as in Roger Reeves v. Sanders Plumbing, SC No. 99-536, June 12, 2000, the petitioners should have been given the right of evidence just as Roger Reeves was given. Respondent was not entitled to judgment as a matter of law under the particular circumstances presented here. The court must review all of the evidence in the record, cf., e.g.Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, drawing all reasonable inferences in favor of the nonmoving party, (the petitioners in the summary judgement) but making no credibility determinations or weighing any evidence, e.g. Lytle v. household Mfg., Inc. 494 U.S. 545, 554-555. The latter functions, along with the drawing of legitimate inferences from the facts, are for the jury, not the court. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255. The court should review the record as a whole. The petitioners evidence in the summary

judgment was treated differently by the courts of Alabama than the evidence in Reeves v. Snaderson Plumbing Products, Inc. SC No 99-536, June 12, 2000, Powell v. State of Alabama 287 U.S. 45-1932, U.S. Suprme Court Case No 98-100, Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986) SC No 87-1602, June 25, 1986 and other cases.

All of the laws of this land state that a person can represent himself in all courts; however Pro Se plaintiffs can never win and the courts in Alabama are all biased against Pro Se plaintiffs.

In this case the respondents have violated many laws including manufacturing shipping and selling recalled defective clothes dryer and products that violates the U.S. consumer product safety commerce laws and the government has done nothing to them for these violations. Hopefully this court will show mercy and help the Pro Se petitioners get justice.

CONCLUSION

The petitioners respectively request that this honorable U.S. Supreme Court grant the Writ of Certiorari in their favor and remand this case to the Alabama Courts for a trial by jury.

A Certificate of Service is attached by separate letter.

Respectfully submitted,

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CASE NO.: 00-1334

IN THE SUPREME COURT OF

THE UNITED STATES

BOBBY W. KENNEDY, et al.

Petitioners

v.

FRIGIDAIRE COMPANY, et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE ALABAMA SUPREME COURT'S DECISION INVOLVED A FEDERAL QUESTION WHICH WOULD PROVIDE THIS COURT WITH JURISDICTION PURSUANT TO 28 U.S.C. § 1257?

II. WHETHER THE PETITIONERS FAILED TO PRESERVE ANY ALLEGED FEDERAL ISSUES BY FAILING TO ADDRESS SUCH ISSUES BEFORE THE TRIAL COURT OR THE ALABAMA APPELLATE COURTS?

LIST OF PARTIES

The following parties judgment is under review by the Petition for Writ of Certiorari.

Petitioners

Bobby W. Kennedy

Carolyn W. Kennedy

Jimmy P. Kennedy

Respondents

Allgas, Inc.

C.L. Jimmy Fortenberry

Frigidaire Company

Lampton-Love, Inc.

Bruce Laviner

Ronald Wayne Puckett

White Consolidated Industries

Pursuant to Rule 29.6, Respondents provide the following additional corporate disclosure statement:

Liquified Petroleum Gas Management, Inc. is the parent company of Allgas, Inc. Lampton-Love, Inc. is the parent company of Liquified Petroleum Gas Management, Inc. Ergon, Inc. is the parent company of Lampton-Love, Inc.

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REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. This Court Should Deny the Petition for Writ of Certiorari Because the Petitioners Fail to Demonstrate that the Decision of the Alabama Supreme Court Involves a Federal Question Which Would Provide this Court with Jurisdiction Pursuant to 28 U.S.C. § 1257.

II. This Court Should Deny the Petition For Writ of Certiorari Because the Petitioners Failed to Preserve any Allegation of a Violation of Their Federal Constitutional Rights Before the Trial Court or the Alabama Appellate Courts.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari to the Supreme Court of Alabama arises from an order denying, without opinion, the Petitioners' Petition for Writ of Certiorari to the Court of Civil Appeals of Alabama. The original lawsuit stated claims alleging violation of the Alabama Extended Manufacturer's Liability Doctrine (AEMLD), breach of express or implied warranties, negligence and wantonness. The defendants and respondents are Frigidaire Company, White Consolidated Industries, Lampton-Love, Inc. Allgas, Inc., Ronald Wayne Puckett, Bruce Laviner, and C.L. Jimmy Fortenberry. The plaintiffs and petitioners are Bobby W. Kennedy, Carolyn J. Kennedy, and Jimmy P. Kennedy, (hereinafter collectively "the Kennedys"). This brief is submitted on behalf of Lampton-Love, Inc., Allgas, Inc., Ronald Wayne Puckett, Bruce Laviner, and C. L. Jimmy Fortenberry (hereinafter collectively "Allgas").

This lawsuit began on April 5, 1997, when the Kennedys filed a complaint in the Circuit Court of Marshall County, Alabama, purporting to allege violation of the AEMLD, breach of express or implied warranties, negligence and wantonness. (C. 12-15).

On July 29, 1998, Allgas filed a Motion for Summary Judgment contending that there were no genuine issues of material fact and that judgment was due as a matter of law on each of the Kennedys' claims. (C. 270). After a hearing held on October 2, 1998, the first trial judge, the Honorable William D. Jetton, entered an order on December 9, 1998 on the case action summary overruling all defendants' motions for summary judgment. (C. 8). On January 13, 1999, Judge Jetton, in response to Motions to Reconsider the Order Denying Summary Judgment filed by all defendants and advice of the Kennedys' counsel, issued an order on the case action summary dismissing by consent the Kennedys' claims of breach of the implied warranty of fitness and the warranty of merchantability. (C. 8).

On July 6, 1999, after additional discovery was taken, Allgas again filed a motion for summary judgment contending that there were no genuine issues of material fact and that judgment was due as a matter of law on the Kennedys' remaining claims of violation of the AEMLD, negligence, and wantonness. (C. 952). After a hearing held on August 23, 1999, the trial judge, the Honorable Tim Jolley,

who had succeeded the retiring Judge Jetton, entered an order on August 30, 1999 granting summary judgment of all of the Kennedys' claims against all defendants. (C. 1409).

On September 24, 1999, the Kennedys filed a Motion for New Trial and/or to Alter, Amend, or Vacate the Summary Judgment Order and Request for Oral Argument. (C. 1418-1423). After a hearing held on November 5, 1999, Judge Jolley, in an order entered on the case action summary on December 7, 1999, denied the motion. (C. 10).

The Kennedys filed a Notice of Appeal to the Supreme Court of Alabama based upon the order denying the Motion to Reconsider. They did not appeal the order dismissing the claims of the breach of implied warranty of fitness and the warranty of merchantability. (C. 1430). On February 1, 2000, the Supreme Court of Alabama transferred this case to the Court of Civil Appeals pursuant to *Alabama Code* § 12-2-7 (1975). (C. 1437).

On June 9, 2000, the Alabama Court of Civil Appeals, affirmed, without opinion, the summary judgment entered by the trial court on behalf of all defendants. On August 4, 2000, the Alabama

Court of Civil Appeals denied the Kennedys' Application for Rehearing and the parties' motions pursuant to Rule 39(k) of the *Alabama Rules of Appellate Procedure.*

The Kennedys then filed with the Supreme Court of Alabama a Petition for Writ of Certiorari to the Alabama Court of Civil Appeals. On November 17, 2000, the Supreme Court of Alabama denied, without opinion, the Petition for Writ of Certiorari. On November 28, 2000, the Kennedys filed an Application for Rehearing with the Supreme Court of Alabama. On December 1, 2000, the Supreme Court of Alabama ordered the Application for Rehearing stricken pursuant to Rule 39(1) of the *Alabama Rules of Appellate Procedure.* On December 8, 2000, the Kennedys filed a Motion to Vacate and Set Aside the Order to Strike the Petition for Rehearing of the Writ of Certiorari and Remand this Case to Circuit Court for Trial by Jury. On December 13, 2000, the Supreme Court of Alabama ordered this motion stricken. This Petition to the Supreme Court of the United States thereafter followed.

ARGUMENT

I. BECAUSE THE PETITIONERS FAIL TO DEMONSTRATE THAT A FEDERAL QUESTION EXISTS, THIS COURT SHOULD DENY THEIR PETITION.

The Petitioners assert that this Court has jurisdiction to review the decision of the Alabama Supreme Court denying their Petition for Certiorari to the Court of Civil Appeals of Alabama pursuant to 28 U.S.C. § 1257. 28 U.S.C. § 1257 sets forth the grounds under which this Court may review a decision of the highest court of a State. It states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

The Petitioners' original lawsuit filed in the Circuit Court of Marshall County, Alabama, presented state law claims of violation of the Alabama Extended Manufacturers Liability Doctrine (AEMLD), breach of express or implied warranties, negligence, and wantonness. It made no allegation of any federal claim. After entry of summary judgment in favor of all defendants and the affirmance of those summary judgments by both the Alabama Court of Civil Appeals and the Alabama Supreme Court, the Petitioners now appear to attempt to argue that the entry of summary judgment against them constituted a violation of their constitutional rights which this Court should redress through certiorari review.

However, an examination of their Petition quickly reveals that the Petitioners do not set forth a valid ground under 28 U.S.C. § 1257 upon which this Court may exercise its jurisdiction to grant certiorari review. First, the Petition does not question the validity of a statute or treaty of the United States. Accordingly, the first basis by which this Court may review this decision does not exist.

Second, at no level in these proceedings do the Petitioners question the validity of any state statute as being repugnant to the

Constitution, treaties, or laws of the United States. Accordingly, the second basis under which this Court may exercise certiorari review of this matter does not exist.

Third, the Petitioners have failed to properly allege that any federal title, right, privilege or immunity is involved. Their original complaint merely sets out garden variety state law claims related to a fire which destroyed a lakehouse they owned. However, in their Petition to this Court, they submit that their constitutional rights were violated due to the summary judgment entered against them and due to a trial judge's comments that "they could not win as Pro Se in his court without an attorney." (See Petition for Writ of Certiorari) Such statements do not amount to specially setting up or claiming any right, title, privilege or immunity as required by Section 1257. *See Adams v. Robertson*, 520 U.S. 83 (1997)("when the highest court is silent on a federal issue before us, we assume that the issue was not properly presented. . . ."). Moreover, none of their submissions to the Alabama appellate courts clearly establishes a claim of a violation of any federal rights. As a result, the third possible ground upon which this Court may exercise jurisdiction does not exist. Because they fail

on all three applicable grounds available under Section 1257, the Petitioners have failed to demonstrate that a federal question exists which would provide this Court with jurisdiction to review by certiorari the decision of the Alabama Supreme Court. Accordingly, the Petition for Writ of Certiorari is due to be denied.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE THE PETITIONERS FAILED TO PRESERVE ANY ALLEGED FEDERAL ISSUES BY NOT PROPERLY ADDRESSING SUCH ISSUES BEFORE THE TRIAL COURT OR THE ALABAMA APPELLATE COURTS.

In reviewing a Petition for Certiorari to a state court, the Petitioners are required to demonstrate, or the record must clearly reflect that the claim(s) was presented to the state court. In *Webb v. Webb*, 451 U.S. 493, 496 (1981) this court stated:

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

The Court further stated:

> Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257. As applied to the circumstances of this case, that statute requires that in the state court, petitioner have "specially set up or claimed under the Constitution . . . of . . . the United States" that right which [they] now seek[ ] to have this Court enforce . . . Similarly, our Rule 21.1(h) requires the petitioner[s] to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon the court."

Webb, 451 U.S. at 495. An examination of their Petition reveals no information which demonstrates that these alleged federal questions were brought up to the Alabama appellate courts. Because the Petitioners have failed to demonstrate that the federal claim was adequately presented to the state courts, their Petition is due to be denied.

Additionally, in *Adams v. Robertson*, 520 U.S. 83 (1997), the Petitioners sought certiorari review of a decision of the Alabama

Supreme Court approving a class action and settlement of the case. The Petitioners alleged that the certification of the class and settlement violated the Due Process Clause of the Fourteenth Amendment of certain members of the class. After initially granting the Petition, this Court dismissed it as improvidently granted due to the Petitioners' failure to properly present the federal issue to the Alabama Supreme Court.

In dismissing the Petition, this Court noted:

> with "very rare exceptions" we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams, 520 U.S. at 86 (citations omitted).

This Court then further explained how the Petitioners' failure to demonstrate that the issue was presented to the Supreme Court of Alabama was fatal.

> When the highest state court is silent on a federal question before us, we assume that the issue was

> not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here. . . ."

Id. at 86-87. The court then explained the manners in which an aggrieved party may demonstrate that the federal question was presented to the state court. It stated:

> We have described in different ways how a petitioner may satisfy this requirement. In some cases, we have focused on the need for petitioners either to establish that the claim was raised "at the time and in the manner required by the state law," or persuade us that the procedural requirements could not serve as an independent and adequate state law ground for the state court's judgment, ... In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time. . . ."

Id. at 87. This Court concluded by dismissing the writ because the Petitioners failed to carry their burden of showing that the federal question was properly presented to the Alabama Supreme Court.

In this matter, just as the Petitioners in *Adams* failed to carry the burden of demonstrating that the federal question was presented to the state court, the Petitioners have failed to demonstrate that their federal question(s) was properly before the Alabama Supreme Court. Their Petition alleges that their constitutional rights were impugned because the trial judge told them they could not win in his court without counsel. Interestingly, after being informed this they obtained counsel to represent them. However, no amended complaint was ever filed with the Circuit Court of Marshall County, Alabama alleging this supposed violation of their constitutional rights. Likewise, they did not raise this issue to the Alabama Court of Civil Appeals in their original appeal. Accordingly, this claim of violation of their constitutional rights was not properly presented to the appellate courts of Alabama.

Furthermore, an examination of the actual record in this case, not the voluminous inadmissible materials cited by Petitioners which are not a part of the record, reveals that the Petitioners' failed to properly make any claims of constitutional violations to the trial court or at any stage in the proceedings before the Alabama appellate

courts. In their original appeal to the Alabama Court of Civil Appeals, the only issue which could arguably be considered to raise an issue of a possible violation of their federal constitutional rights was phrased as follows:

> Whether appellants' constitutional rights were violated when appellants' Motion to Alter, Amend, Vacate and New Trial were denied.

(See Petitioners' Brief to Alabama Court of Civil Appeals)

However, much like their Petition to this Court, Petitioners' Brief filed in support of their original appeal was so incomprehensible that it failed to set forth any basis or support for this issue. Accordingly, the Alabama Court of Civil Appeals did not have any claim of violation of the Petitioners' constitutional rights before it. As a result, the Petitioners failed to clearly and concisely raise a question of federal law to the Alabama Court of Civil Appeals.

III. THE PETITIONERS' CLAIMS DO NOT CONSTITUTE FEDERAL CONSTITUTIONAL VIOLATIONS.

Even if this Court accepts the Petitioners' claims as properly submitted and ruled upon by the Alabama Supreme Court, which the

record clearly reflects is not the case, a cursory examination reveals that their claims do not constitute federal constitutional violations. Their main allegation in this Petition for Writ of Certiorari is that their constitutional rights were violated due to the entry of summary judgment against them and the affirmance of that summary judgment by the Alabama appellate courts. The first question presented in their petition begins as follows:

> Whether the petitioners were discriminated against and denied due process and equal protection of the law and denied a trial by jury when the circuit judge was biased against the petitioners issued a summary judgment in favor of the defendants, affirmed by the State Supreme Court. . .

(Petition for Writ of Certiorari)

This Court has previously upheld the summary judgment mechanism of disposing of cases. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1985) this Court stated:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on

> file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, the requirement is that there be no *genuine* issue of *material* fact.

See also, Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden at trial.")

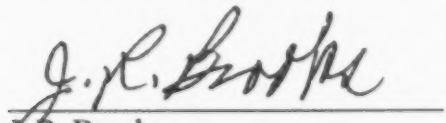
Although the case at bar was disposed of at the trial court level by Rule 56(c) of the *Alabama Rules of Civil Procedure*, the relevant language is identical. Accordingly, the analysis this Court has previously rendered regarding the appropriateness of the summary judgment process demonstrates that the entry of summary judgment against a party, in and of itself, does not constitute a

constitutional violation. Summary judgment is a long accepted and approved method of disposing of cases in which the moving party is entitled to judgment as a matter of law. In the case at bar, the Petitioners seek to turn the use of this accepted method against them into a constitutional violation. Because the Petitioners provide this Court with no legal authority supporting such a theory, they cannot and do not demonstrate that they have suffered a deprivation of their constitutional rights. Their petition is therefore due to be denied.

CONCLUSION

For all the foregoing reasons, Respondents Lampton-Love, Inc., Allgas, Inc., Bruce Laviner, Ronald Wayne Puckett, and C. L. Jimmy Fortenberry request this Court to deny the Kennedys' Petition for Writ of Certiorari.

Respectfully submitted,



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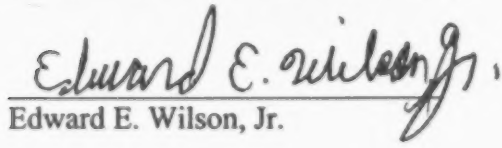

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the following by placing a copy of same in the United States Mail, postage prepaid and properly addressed, on this the 22 day of March, 2001:

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